CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1849.

JEREMIAH BROWN'S ADM'RS *vs.* JAMES K. HATTON.

The Clerk of a District Court of the United States furnished certain transcripts of record to a collector of the customs, who applied for them officially, and, as he stated, by the direction of one of the auditors of the United States' Treasury. *Held*, that the Clerk could not hold the collector personally responsible for his fees, but must look to the United States' Government for what was due to him.

The construction of a written instrument belongs to the Court and not to the jury.

The cases of *Hite* v. *Goodman*, 1 Dev. & Bat. Eq. 365, and *Dameron* v. *Irwin*, 8 Ired. 421, cited and approved.

Appeal from the Superior Court of Law of Craven County, at Spring Term 1849, his Honor Judge BATTLE presiding.

The plaintiff's intestate, Jeremiah Brown, was Clerk of the United States District Court, for the District of Pamlico, and the defendant, Collector of the customs at Washington. On the 4th of November, 1845, the defendant addressed to the intestate a letter, of which the following is a copy: "Sir. I have to request that you will furnish *this office*, as early as you can find it practicable and convenient, a certified *list* of all custom house bonds from Washington, N. C., on which judgments in favor of the United States are had in the United States District Court for the District of Pamlico at Newbern. Also, all such as may have been in suit, if any such there be, with the date, on which they fell due, the names of the makers and sureties, the amount, for which said bonds were originally made, the amount of each payment and date thereof, and the amount still due on principal," &c. This letter is signed, "James K. Hatton, Collector," and addressed, "J. Brown, Esq., Clerk of the U. S. District Court, Newbern, N. Carolina." On the 11th of November, 1845, the defendant again wrote to the intestate as follows: "Sir. On the 4th ultimo, I requested you to furnish to *this office*, a certified *list* of all bonds or judgments belonging to this office, stating at the same time, that the *list furnished by you* to T. H. Blount, Esq., late collector, was, according to his statement, incomplete, inasmuch as it did not contain all bonds and judgments in *your office*, belonging to this," &c. This letter then states, "my object was to get a correct *list*, that I might comply with a request made to me, from the first Auditor of the United States Treasury, *for the same*. Your failing to comply with that simple request, has greatly disappointed me, and may subject me to some considerable loss." It then makes the request for the *list* in the same terms as before. The third letter, written on the 20th of November, 1845, was addressed by the defendant to the intestate, repeating the request for the *list*, as stated in the proceed-

ing ones. These two last are addressed as the first and signed as that was. These letters were produced in evidence by the plaintiff, who further proved, that the intestate, in consequence of the request contained in them, had made out and sent to the defendant copies of the records required. The plaintiff's declaration, which was in assumpsit, contained two counts, the first, upon an account for the copies of the records sent, &c.; the second, for work and labor done.

The defendant insisted, that the contract was made with him, as an officer and agent of the General Government, and he was not personally answerable.

The presiding Judge was of opinion, that from the testimony, produced by the plaintiff, it appeared, the credit, given by the plaintiff, was to the General Government, and that there was nothing to show that the defendant intended to become personally responsible.

In consequence of this opinion, the plaintiff submitted to a non-suit and appealed.

James W. Bryan, for the plaintiff, submitted the following argument:

There is error in the ruling below. The Act of Congress of 1799, Ch. 128, Sec. 21, Laws of the United States by Story, which prescribes the duties of collectors of customs, requires them to receive all monies paid for duties, and *to take bonds for securing the payment thereof, and to keep fair and true accounts, and records of all their transactions, as officers of the customs*, in such manner and form, as may from time to time be directed by the proper department, and shall, at all times, submit their books, papers and accounts, to the inspection of such persons as may be appointed for that purpose, and shall render an account once in every three months for settlement; and on failure so to do, in each and every case, the delinquent officer shall forfeit, and pay for the use of the United

States, one thousand dollars, to be recovered with costs of suit. The collector is also required to take an oath, and enter into bonds for the faithful performance of the duties of his office. The defendant had no authority, either express or implied, from the General Government, to employ the plaintiff to furnish him with a certified list of all the bonds and judgments upon the same, belonging to the defendant's office, inasmuch as it was made the duty of the defendant by law, to have and keep a record of the same, in his own office; and it is manifest both from the Act of Congress, and the letters of the defendant to the plaintiff requesting this service, that the requisition made upon the defendant by the first Auditor of the Treasury of the United States, was personal to the defendant, and was to be complied with by him from the evidence which his own books ought, and were required by law, to furnish, and that his object in securing the services of the plaintiff was, to aid *him personally*, so that, to use his own language, he might "make a correct list," and thereby be better enabled personally to comply with the requisition of the Auditor; he well knowing, that a failure on his part to keep a true record of the same, or to comply with the requisition of the Auditor, would subject him, as he states, to "a considerable loss," of one thousand dollars, as specified in the Act of Congress, for such delinquency. The services, therefore, rendered by the intestate, were personal to the defendant, and the credit given by him, was to the defendant, and not to the General Government.

The description of office—"collector"—annexed to the name of the defendant, will be treated as a mere designation of the person, and not as a qualification of his personal responsibility. *Thomas* v. *Bishop*, 2 Strange R. 955. *S. C. Cas. Temp.*, Hard. 1; and it is by no means true, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exer-

cise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments, known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts, first, that the act was done in the exercise, and second, within the limits of the powers delegated. These facts are necessarily enquired into by a Court and jury; and this enquiry is not confined to written instruments alone, but to any act, with or without writing, within the scope of the power or confidence reposed in the agent. *Mechanics Bank* v. *Bank of Columbia*, 5 Wheaton's R. 337. The General Government did not wish a transcript of the record of the judgments upon the bonds from *the Clerk of the District Court of the United States*, but a statement from *the defendant*, as Collector of Washington, of the bonds sued on or due from individuals within his collection district, as appeared on the books of his office. If the books of his office were deficient in this particular, it was his personal duty to supply the defect, as he was bound to keep a true record of them; if he required aid to supply this defect, and obtained it from the intestate, he became personally bound to pay for it. The person who requests a copy of a record must pay the Clerk for it—*Caldwell* v. *Jackson*, 7th Cranch R. 276—and a collector, like other public officers, cannot bind the United States, by any acts beyond, or contrary to, the authority given him by law. *Johnson in Error* v. *The United States*, 5 Mason's C. C. R. 425.

In the case of *Sheffield* v. *Watson*, 3 Caines' Rep. 72, the Court say, it is not enough that the plaintiff knew the defendant to be a public agent, and that the frigate, built by the plaintiff, was to be a public vessel; but it should appear that the defendant contracted in his official capacity, and on account of the United States, and that the plaintiff gave credit to, and *intended* to look to the Gov-

ernment alone for compensation. The reasoning of the Court in *Cullen* v. *Queensbury*, 1 Brown's Ch. R. 101. note, shews pretty strongly the injustice and unfitness of too easily listening to an objection like the present, and turning round the party, from the person with whom he contracted, as the defendant did the plaintiff, in his answer of the 31st day of March, A. D. 1840, to the demand of the plaintiff for payment, to those he may choose to set up as principals.

It is contended that there was error in not submitting the question of fact, as to whom the credit was given in this case, as well as the *intention* of the parties, to the jury, and also as to the legal construction of the agreement between the parties, as evinced by the letters of the defendant, and the inferences to be drawn therefrom. The leading case of *Hodgson* v. *Dexter*, 1 Cranch R. 363, does not sustain the defendant, though mainly relied upon by him. In that case, it is stated and admitted by the counsel on both sides, to be a question of *intention*; and the Court recognize that position as correct, and they go into an examination of the circumstances to ascertain *the intention*, and observe that the whole agreement manifests, very clearly, *a contract made entirely on public account*, without a view by either party to the responsibility of Dexter; and this will be found to be the principle through all the cases in the *English* Courts on this subject. The cases in our own State, seem to rest for authority, upon that of *Hodgson* v. *Dexter*. In *Hite* v. *Goodman*, 1 Dev. & Bat. Eq. Rep. 364, the promise or agreement purported to be an order of the embodied magistracy of Gates County, acting in their official or public capacity, offering a reward of sixteen hundred dollars for the apprehension of certain runaway slaves, and a command to that County, and its fiscal officers, with no consideration or benefit moving personally to themselves. In that case there could be no pretence that the defendants were or

intended to be personally bound, and it is obvious that they acted, or assumed to act for the public. In *Dameron v. Irwin*, 8 Ire. R. 421, the action was debt, upon a covenant or agreement entered into by the defendants, *as Commissioners for and on behalf of the County of Mecklenburg*, agreeing to pay the plaintiff a specific sum to build a *Court House* for the *County of Mecklenburg*. There could be no difficulty in ascertaining the *intention* of the parties to this agreement, and the Court explicitly declare, that where it appears from the contract, that it was made by *public commissioners in behalf of the public*, whether they were commissioners for the County or for the State, *such commissioners* are not personally bound for their contract.

In cases of public agents, the Government, or other public authority, is not bound, unless it manifestly appears, that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration or representation of the Government. Indeed this rule seems indispensable, in order to guard the public against losses and injuries arising from the fraud, or mistake, or rashness, and indiscretion of their agents. *Story on Agency*, 389. *Lee* v. *Munro*, 7th Cranch R. 366.

No counsel for the defendant.

Nash, J. There can be no doubt, that a public agent, acting in behalf of the public, may render himself personally liable. The inquiry here is, whether the defendant has so done.

The Act of Congress, passed in 1791, ch. 128, pointing out the duties of collectors of the customs, is of no further use in this investigation, than as it may serve to explain the anxiety, expressed by the defendant, that he might

be enabled, through the aid of the intestate, to comply with the request from the Treasury Department. It appears that Mr. T. H. Blount had preceded the defendant in the office of collector of the port of Washington, and in the list, furnished him by the intestate, were several omissions of bonds and judgments. This list was embodied in his report, we presume, to the office. With a view to supply this deficiency and to ascertain if there were any further omissions, the requisition was made upon the defendant by the Department. The plaintiff's intestate, Mr. Brown, is distinctly apprised of these facts, and is informed, that nothing is needed but a *list* of the bonds and judgments, &c., not for the purpose of enabling the defendant to comply with his duty to the public, for the Act of 1791 required him only to make a due return of the bonds *in his office*, and the case shows, that the bonds in suit in the District Court never had been in his office since his appointment, but had been put in suit by his predecessor. The information sought to be obtained by the defendant was of no personal interest to him, any further, than, as a faithful public servant, he was bound to aid the Department in ascertaining what was due from its debtors. In all his letters, he informs Mr. Brown for whom the information is needed and why. The bonds are described as belonging to the office at Washington, and the letters are signed by the defendant as collector. There is not in any part of the written evidence the slightest proof that the defendant intended to make himself personally responsible, and that responsibility must be explicitly undertaken. *Hite* v. *Goodman*, 1 Dev. & Bat. Eq. 365. *Gidly* v. *Palmerston*, 2 Bro. & Bing 275. The plaintiff contends, that the records were made out by him, not for the Government, but for the defendant, to enable him to execute his official duty, and relies upon the language, used by the defendant, expressive of his fears, that he would suffer in consequence of the plaintiff's

neglect in complying with his request. We do not so read the letters. The defendant, in each of his communications, appears to guard against any idea, that the work was for his benefit. On the contrary, in each application, he states, it is made to enable him to comply with a *request* from the Department, and that the application is rendered necessary by the plaintiff's intestate's own neglect, as he had been informed, in not making out a perfect list for Mr. Blount. As to his fears of being injured by Mr. Brown's delay, it might arise to him in several ways without embracing the idea, that the list was necessary to him. We are of opinion, that the work was done at the instance, and for the use, of the General Government, and to it the plaintiff must look for remuneration, the defendant not having made himself responsible, either by contract or fraud.

The plaintiff further contends, that his Honor erred in not leaving the construction of the letters to the jury, as a matter of fact to be found by them. The letters were produced in evidence by the plaintiff to show the defendant's liability, as containing the contract, under which the services were rendered. The contract then was in writing, and the intention of the parties is to be ascertained from it. This is admitted by the defendant's argument; he does not pretend, that, if left to the jury, they could have looked out of the letters. If so, then it was a pure matter of construction to be placed upon a written instrument, containing in itself every thing necessary to its being properly understood. We think his Honor committed no error in the instruction he gave the jury—it was a question of law, and not of fact. The case now before us is not as strong as that of *Dameron* v. *Irwin & others*, 8 Ire. 421, and the whole defence here is covered by it.

Per Curiam. Judgment affirmed.

JAMES FLINN *vs.* TIMOTHY ANDERS.

A count for a forcible entry may be joined with a count for an assault and battery.

The law permits to each tenant in common a peaceable entry upon every portion of the land held in common, but it does not justify any actual force applied to the person of his co-tenant.

Appeal from the Superior Court of Law of Bladen County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

The defendant and one Meredith were tenants in common of the tract of land, where the trespass was committed. The plaintiff was in possession of a part of the land, as the tenant of Meredith. While so in possession, the defendant, together with others, who were aiding and assisting him, entered the house, in which the plaintiff lived, and forcibly turned him out. In doing so, they committed an assault upon his person. The declaration contained two counts; the first, for a trespass to the plaintiff's close; the second, for the trespass to his person. The jury were instructed, that the plaintiff was not entitled to a verdict on the first count, and that they could give no damages, except such as arose to the plaintiff, because of the personal injury to him.

The jury found a verdict for the plaintiff on the second count, and from the judgment upon it, the defendant appealed to the Supreme Court.

Strange and *D. Reid*, for the plaintiff.
W. H. Haywood and *W. Winslow*, for the defendant.

NASH, J. It is unnecessary for us to express an opinion as to the correctness of the charge upon the first count.

The defendant, the appellant, does not complain of it and it forms no part of his bill of exceptions.

We cannot well perceive where the error in law lies in the charge upon the second count. There can be no doubt, that the two counts can be joined; and there is as little doubt, that one tenant in common of land may commit an assault and battery upon the person of his co-tenant. While the law permits to each tenant in common a peaceable entry upon every portion of the land held in common, it does not justify any actual force applied to the person of his co tenant. The case states, that the defendant did commit an assault and battery upon the person of the plaintiff.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JAMES MEREDITH *vs.* TIMOTHY ANDERS.

A testatrix devised as follows: "For the love and affection, which I have to J. M., and to enable him to take care of my two old negroes, B. and R., who I wish to remain where I now live and support themselves, I giv and bequeath the land whereon I now live," &c. *Held*, that J. M. took a valid legal estate in the land, notwithstanding the objection made, that J. M. was to take and hold the land in trust for the negro slaves.

Appeal from the Superior Court of Law of Bladen County, at the Fall Term 1848, his Honor Judge PEARSON presiding.

The lessor of the plaintiff claims under the will of Elizabeth Locke. The testatrix devised as follows: "For the love and affection which I have for James Meredith, and to enable him to take care of my two old negroes, Ben and Rachel, who, I wish to remain where I now live and support themselves, I give and bequeath the land whereon I now live, with all and singular the improvements, containing two hundred acres," &c. "Should the said Meredith find it necessary for his own convenience and the good of the neighborhood to remove said negroes to his own house, I wish him to do so." The counsel for the defendant moved the Court to instruct the jury, that the devise was not to the lessor of the plaintiff, but to the two old negroes, or in trust for them, and was therefore inoperative and void. The Court declined to give the instructions prayed for, but charged, that the land was devised to the lessor of the plaintiff, and not to the two negroes, nor in trust for them.

The jury returned a verdict for the plaintiff, and, judgment being rendered, the defendant appealed to this Court.

D. Reid, for the plaintiff.

Strange, *W. H. Haywood* and *Warren Winslow*, for the defendant.

Nash, J. The only question presented to this Court is, as to the devise of the two hundred acres. The construction put upon it by the presiding Judge in the Court below was correct. The land is, by the will of Elizabeth Locke, given to the lessor of the plaintiff, and the cause assigned, to-wit, her love and affection for him, and to enable him to take care of the old negroes. But it is insisted by the defendant, that, if this be so, it is a devise to him in trust for the two old negroes, and it is consequently void and inoperative. Be this as it may, the question cannot

arise in this case. We are now in a Court of law, and the legal title must prevail. By the will, that title is in the lessor of the plaintiff.

We see no error in the opinion of the Court below, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM A. HARDISON *vs.* SAMUEL C. BENJAMIN.

Although the bond of a person, arrested upon a *ca. sa.* within twenty days of the term of a Court, should be conditioned for his appearance at the next succeeding term, yet the debtor may waive this privilege, and give a bond for his appearance at the first term, and this bond shall be valid.

Appeal from the Superior Court of Law of Martin County, at the Spring Term 1849, his Honor Judge SETTLE presiding.

A *ca. sa* issued against the defendant, Benjamin, by a justice of the peace, on the 1st day of December, 1848. At January Term of the County Court of Martin, the constable returned the *ca. sa.*, and a bond in the usual form for the appearance of the said Benjamin, to take the benefit of the insolvent law. The bond was dated, 1st of December 1848, and recites that "Benjamin being then arrested," &c. Benjamin, being called, failed to appear, and a motion was made for judgment on the bond; judgment was entered accordingly, and the defendant appealed to the Superior Court. The defendant's counsel resisted the judgment in that Court, and proved that the bond, although dated on the 1st of December 1848, was not

executed until the Monday of January Court, 1849, and was dated back. The plaintiff proved, that the defendant had been arrested thirteen days before the Court, and by an arrangement with the officer, entered into at the defendant's request, he was allowed to go at large, the officer taking his promise, that he would execute the bond on the Monday of January Court, which he did accordingly. His Honor gave judgment for the plaintiff; and the defendant appealed.

Biggs, for the plaintiff.
No counsel for the defendant.

Pearson, J. As the arrest in this case was made within twenty days of the January Term, the bond ought "to have been conditioned" for the debtor's appearance at April Term. This provision is made for the benefit of the debtor, to enable him to prepare his schedule and to give notice to all of his creditors. We can see no reason why this, like other benefits given by law, may not be waived, if the party see fit to do so. In this case, it was agreed, that, if permitted to go at large until Court, he would then execute "the bond;" by which, we understand, the bond in question, dated as of December 1st, 1848, and reciting, that he was *then arrested*. This being voluntarily done, the party must abide by it. If the officer, upon arresting the debtor thirteen days before January Court, had refused to take a bond for his appearance at April Term, and insisted upon holding the debtor in custody, unless he would execute a bond, dated 1st of December, and for his appearance at January Term, the bond, so executed, would have been void, as obtained by duress. But in this case, the bond was given, after the debtor was out of custody, in pursuance of an arrangement, entered into at his instance.

Bail bonds are required to be taken in a particular form, by the statute of 23 H. 6, ch. 9; and the statute de-

clares that all bonds not taken in that form shall be void. There is no provision of the kind in reference to a *ca. sa.* bond taken by a constable. The debtor is left to his remedy, by motion at the appearance Term, to set aside the bond, if taken contrary to law, by duress or otherwise, and has his action against the officer; but the Court ought not to set aside a bond, voluntarily given, in pursuance of an express arrangement, made for his ease and favor.

PER CURIAM. Judgment affirmed.

JAMES HILL *vs.* HENRY JACKSON.

The passage of the several Acts of Assemby, enlarging the time, within which grants shall be registered, makes them good and available by relation back, from the time when they are dated, as much so as if they had been registered within two years.

The case of *Scales* v. *Fewell*, 3 Hawks 16, cited and approved.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term 1849, his Honor Judge DICK presiding.

This is an action of trespass *quare clausum fregit*. The plaintiff claimed to hold the land in question under a grant, issued in 1843, to Jesse Walker and Marsh Dorsett. The defendant claimed to hold under a grant issued in 1783 to Absalom Tatum and William Moore, which also covered the land in dispute; and, to sustain his allegation, offered in evidence the copy of a grant issued by

the Secretary of State to Tatum and Moore, which was registered by the Register of Randolph County during the trial. This evidence was objected to by the plaintiff's counsel, because the copy offered did not appear to be full and complete; and, if complete, it had not been registered within the time prescribed by law; and, if valid after registration, it could not by relation extend back, so as to defeat the plaintiff's title under Walker and Dorsett. The Court admitted the evidence, and instructed the jury, that the copy, read in evidence, from the office of the Secretary of State, did relate back so as to defeat any title in Walker and Dorsett, derived under their grant.

The defendant further introduced evidence, showing that he entered upon the land under a lease from the devisees of William Moore and the heirs of the other deceased devisees. The plaintiff entered into a vacant house upon the lands in question, but no evidence was offered, tending to show, that he entered as the tenant of Walker and Dorsett, or, in any manner, claimed under their authority; and the Court so instructed the jury.

The presiding Judge instructed the jury, that, inasmuch as no connection was shown between the plaintiff and Walker and Dorsett, the former would not in law be in possession of all the lands contained in the Walker and Dorsett grant, but only of the house and land in his enclosures; and, if they believed, that no trespass was committed on these, the defendant was not guilty. A verdict was rendered for the defendant.

Rule for a new trial—first, because the Judge erred in receiving as evidence the copy of the grant from the Secretary's office.

Secondly—Because of error in instructing the jury, that the registry of the copy of the grant from the Secretary's office related back, so as to defeat any title derived by Walker and Dorsett under their grant.

Thirdly—Because of error in instructing the jury, that there was no evidence that the plaintiff entered under Walker and Dorsett, inasmuch as it had been proved, that an angry altercation took place between the defendant and Marsh Dorsett, at which the plaintiff was not present, in which Dorsett was complaining of the defendant's conduct and threatened him with a suit.

Rule discharged—judgment for the defendant, and appeal.

J. T. Morehead, for the plaintiff.

No counsel for the defendant.

NASH, J. The first objection is, that the copy of the grant to Tatum and Moore, which was offered in evidence by the defendant, was incomplete, and had not been registered in the County of Randolph, within the time prescribed by law. The first branch of the objection is not true in point of fact—the copy is complete. As to the second branch, the facts were, that the copy was not registered until the sitting of the Court. The grant is dated in 1783, and ought by the terms of the act of 1783 to have been registered within twelve months from its date. But the Legislature has uniformly, with one omission, passed laws at every session to enlarge the time. The omission alluded to, was at the session of 1819, but it was supplied at the session of 1821, and care has been taken, that there should be no such failure since. The copy of the grant, offered in evidence, was registered in Randolph County, in the month of March, 1849; and at the preceding session of the Legislature, held in 1848, the usual act for prolonging the time for registering grants was passed; so that, in truth, the grant was registered in Randolph County within the time prescribed by law; and, when so registered, the act of 1836, ch. 42, sec. 24, makes it evidence.

The second objection cannot avail the plaintiff. The passage of the acts, to which reference has been made, prolonging the time, within which grants shall be registered in the County, has practically the effect of rendering nugatory that clause in them; and must continue to have that effect, as long as the Legislature shall continue to pass them. I mean that it renders nugatory the effect, that the neglect to register the grant, within a limited time, might have. The grant then may be registered at any time, if, at that time, there be any law authorising the act, which is not denied in this case. If the registration of the grant was legal, then it must have the effect of relating back; this is a necessary consequence, and daily recognized in our practice. *Scales* v. *Fewel*, 3 Hawks. 16. There is scarcely one grant in a hundred, which is registered within two years from its date. Nor is it even thought necessary to examine into the date of its registration. It can make no difference, that the grant in this case was not registered before the action was brought. If the intention of the registry acts is to give notice to the citizens of the County, what lands are vacant, and if it be desirable, that such notice should be given, the policy of the continuing acts may be well questioned, but our duty is to execute the law as we find it.

The third objection is not sustained. There was no evidence, that the plaintiff entered as the tenant of Walker and Dorsett, or, in any manner, claimed under their authority. The altercation between the defendant and Dorsett was entirely irrelevant.

We see no error in the opinion of his Honor on the points brought here.

PER CURIAM. Judgment affirmed.

CHARLES G. HAUGHTON & AL. vs. WILLIAM H. BAYLEY & AL.

Where two persons, each out of his own stock, delivered goods to a third person to be peddled, and took a bond payable to themselves jointly for the faithful accounting therefor; *Held*, that they could recover upon a bond so taken, notwithstanding each had a separate individual interest.

Appeal from the Superior Court of Law of Bertie County, at the Spring Term 1849, his Honor Judge MANLY presiding.

This was debt upon a bond, executed by the defendants for the sum of five hundred dollars, and payable to the plaintiffs, dated 30th of November, 1847, with a condition, that "William H. Bayley, having this day received of Charles G. Haughton and Joseph G. Godfrey a stock of goods, to peddle with; now, if the said Bailey shall well and truly pay unto Charles G. Haughton and Joseph G. Godfrey the just and full amount of the stock of goods on the 1st day of April next, then the above obligation to be void," &c.

The breach was a failure to pay for the goods. Pleas, condition performed and no breach. The plaintiffs offered to prove, that each of them owned a store in the County of Bertie, the one about six miles from the other: That each, from his individual effects, in which the other was admitted to be in no way interested, furnished to the defendant Bayley a parcel of goods, on the day the bond was executed, for which the said Bayley was to account, and pay them respectively; and that Bayley had commenced peddling, and disposed of the goods, and failed to account and pay over.

His Honor "deemed the evidence inadmissible." The plaintiffs submitted to a non-suit, and appealed.

Biggs, for the plaintiffs.

No counsel for the defendants.

Pearson, J. We think the view taken of the case, in the Court below, was wrong. As the goods were the individual effects of the plaintiffs, and were delivered by each in separate parcels, the regular way was for each to take a bond payable to himself, and, if no bond had been taken, they would have been compelled to bring separate actions; but the parties saw fit to cover the whole transaction by one bond, and there can be no good reason why an action may not be maintained upon it. The object of the evidence was to show what goods Bayley had received of the plaintiffs on that day, and for which it was intended the bond should be a security.

If the plaintiffs had been partners and had jointly delivered a parcel of goods to Bayley, the bond would most fitly have applied to them, to the exclusion of individual goods separately delivered by each. But there was no copartnership, and the question is, whether the bond be wholly inoperative, as having no subject to apply to; or whether it be applicable to goods separately delivered by the plaintiffs to Bayley on that day. Clearly it was the intention of the parties, that the bond should apply to these goods, as there are no others to fit the description more nearly, and these goods fall under the general words of "a stock of goods to peddle with, received by Bayley of Charles G. Haughton and Joseph G. Godfrey, on the day the bond was given."

The non-suit must be set aside and a *venire de novo* issued.

Per Curiam. Judgment accordingly.

WILLIAM A. DARDEN, EX'OR &c. *vs.* JOHN JOYNER.

Where on a divorce a *mensa et thoro*, the wife is allowed, in part of alimony, the rent of certain lands, out of which she makes an annual saving, the husband has no right to the amount accumulated out of such saving.

Appeal from the Superior Court of Law of Greene County, at the Fall Term 1848, his Honor Judge SETTLE presiding.

This was an action of assumpsit. The questions were presented to the Court upon the following case agreed.

Elizabeth Rogers, the wife of Stephen Rogers, the plaintiff's testator, in 1837 was divorced from bed and board, and allowed, as alimony, one third of the annual rent of a tract of land and the service of three negroes. Her part of the rent amounted to $60 per annum, which she regularly received. In 1838, she sold the negroes to one Vines for $1000, and gave him a bill of sale with warranty of title. In 1841, Elizabeth Rogers made a paper writing in the nature of a last will and testament, which was, after her death, admitted to probate in 1845. By it, she disposed of such money, notes, and effects, as she had at her death, making the children of the defendant, with whom she had boarded since her divorce, *without charge*, her legatees. The defendant took out letters of administration with the will annexed, and possessed himself of her estate, amounting to $2046 21 cts. The items consisted of the $1000, and interest, received of Vines for the sale of the negroes; several notes, which were her savings out of the amount of the rent of the land, annually received; a few articles, acquired by her own industry, such as bed quilts, &c.

After the death of Elizabeth Rogers, Stephen Rogers instituted an action against Vines, the vendee of the ne-

groes, and recovered and received from him their value. See *Rogers* v. *Vines*, 6 Ire. 293. Rogers died in 1847, having appointed the plaintiff his executor. The defendant, without suit, paid to Vines the $1000 and interest, which he had paid Mrs. Rogers for the negroes and for which he held her warranty, after the recovery by Stephen Rogers. Plaintiff demanded of defendant the entire sum of $2046 21 cts. Defendant refused to pay any part.

It is agreed, that if the plaintiff be entitled to recover of the defendant the amount received by Mrs. Rogers for the negroes with interest, and the amount, saved by her out of the rent, the plaintiff should have judgment for $2004 62. If the plaintiff be entitled to recover the price of the negroes with interest, but not the savings out of the rent, then judgment is to be entered for $1562 37. If the plaintiff be entitled to recover the savings out of the rent, but not the price of the negroes, then judgment is to be entered for $442 03, unless the defendant be entitled to commissions, which deduction would leave a balance of $332 53, for which judgment is to be entered. If the plaintiff be entitled to neither sum, then judgment to be entered for the defendant.

His Honor directed judgment to be entered for the plaintiff for the sum of $332 53, from which judgment both the plaintiff and defendant appealed.

J. H. Bryan and *J. W. Bryan*, for the plaintiff.

Rodman, for the defendant.

Pearson, J. We think the plaintiff was not entitled to recover, either the price of the negroes, or the savings of his testator's wife, out of the annual rent, received by her, and that judgment should have been entered for the defendant.

As to the price of the negroes, the plaintiff was not entitled to recover. Rogers had received of Vines the

value of the negroes, thereby repudiating the sale made by his wife, and in no point of view, could the money, paid by Vines to Mrs. Rogers, be considered the money of her husband. After the divorce, the wife had a right "to sue and be sued, claim redress for, and be made liable upon, contracts, as though she were a *feme sole*." By the sale of the negroes, although the sale was wrongful, the money became hers, and she was liable upon the warranty.

The view presented by the plaintiff's counsel, is not tenable; for, admit "the contract of sale to have been a perfect nullity," the money, handed to Mrs. Rogers, was not the money of Rogers, but was the money of Vines, received for the use of Vines.

As to the savings out of the rent, we think the plaintiff was not entitled to recover. After the divorce, the wife had "capacity to acquire and dispose of such property, as she might procure by her own industry, or as might accrue by descent, devise, &c., or in any *other manner*."

It might be urged with much force, that "these savings" fall under the words "property acquired by her own industry;" for, if a wife pays her board by working, and thereby is enabled to save a part of the sum annually allowed for her maintenance, it is the same thing, as if she had paid her board out of the sum allowed and received wages for her work. But the right of the wife to her savings is unquestionable, upon the ground that the decree of alimony vests the title in her. If there is no reconciliation, she has an absolute right to the sum allowed and received annually for her maintenance; in which respect, it differs from *specific property* assigned to her separate use. If the allowance be too much, the Court has power at any time to reduce it—if too little, to increase it; and thus it is at all times subject to the control of the Court, and it tends to make the wife industrious and economical, to allow her to have the savings.

It is not necessary to decide, whether the wife had capacity to make a will under the word "dispose." If she had capacity, she has exercised it. If the word "dispose" is confined to sales or gifts, in her life time, so that she died without making a disposition, the Act provides, that her estate "shall be transmissible, in the same manner, as though she were *unmarried*." This *excludes* the *husband*, and take it either way, he has no right.

The judgment below must be reversed and a judgment be entered for the defendant.

PER CURIAM. Judgment accordingly.

THE STATE *vs.* GRIFFIN STEWART.

It is in the discretion of the Attorney General, on the trial of a capital case, to introduce on behalf of the State, only such witnesses as he may think proper.

If, on the trial of a slave for a capital offence, the counsel for the prisoner does not ask the Court to give to a mulatto witness, introduced on the part of the State, the charge required by the Act of Assembly, Rev. Stat. Ch. 111, Sec. 51, advantage cannot afterwards be taken of the omission of the Judge to make such charge.

Whether such a charge was or was not given, cannot appear upon the record, unless placed there by the exceptions of one or the other party.

The case of the *State* v. *Martin*, 2 Ire. 120, cited and approved.

Appeal from the Superior Court of Law of Nash County, at the Spring Term 1849, his Honor Judge SETTLE presiding.

The prisoner was indicted for murder, in killing Penny Anderson.

The State proved, that the prisoner and Penny Anderson had lived together for several years, as man and wife, although not married: That in October 1848, Penny Anderson was, on Monday night, at home with the prisoner. During the night, blows were heard and much lamentation, as of a person suffering under a violent beating and begging for mercy. The out-cry was in the direction of the prisoner's house, and the cries were in the voice of a female. The next morning Penny Anderson was missing; and the prisoner, being asked where she was, said: "She had gone to one Hale's," who lived about ten miles off. Upon search, it was found she had not been at Hale's, nor could she be found any where. In about six weeks afterwards, herbody was found, partially buried in an out-of-the-way place, some five hundred yards from the house of the prisoner. The body, although putrid, exhibited many marks of violence, particularly about the throat, as if she had been choked to death. The body was identified by a ring on a finger, by several articles of clothing, by a broken finger, and by other modes of identification. The State proved many other circumstances, tending strongly to show, that the prisoner had murdered her.

The prisoner was of a black complexion. He had lived in the neighborhood about ten years, and during all that time he passed for, and was treated as, a free negro; and the case states, that he was treated as a free negro during the whole trial, and spoken of as such by the counsel. The jury found the prisoner guilty of murder.

It was in evidence, that no person was at the house of the prisoner on the night of the alleged murder, except the prisoner, the deceased, and a little boy, the grandson of the deceased, between seven and eight years of age. Several of the State's witnesses were mulattoes. In the opening address to the jury, the counsel for the prisoner *strongly* urged, that, as the State had not examined the

boy, who was the only person present, every presumption should be made against the prosecution, because a witness was kept back, whom it was the duty of the State to have called and examined. The Attorney General was permitted by the Court to interrupt the counsel and say: "the boy was in Court, he had examined him, and did not call him as a witness, because he was satisfied he was too ignorant to be competent, but the prisoner's counsel was at liberty to offer him to the Court, that his capacity might be judged of, and to call him as a witness on the part of the prisoner." The prisoner's counsel declined the proposition, and moved the Court to instruct the jury, that they should not convict upon circumstantial evidence, as there was a person present at the alleged murder, who was a competent witness, so far as it judicially appeared, and could give direct testimony. The Court refused to give the instruction.

The prisoner's counsel moved for a new trial, because the Court refused to give the instruction prayed for, and because the Court permitted the Attorney General to make the interruption.

Attorney General, for the State.

No counsel for the defendant.

PEARSON, J. There was no error in refusing the instruction. The counsel for the prisoner fell into an error in supposing, that circumstantial evidence was *secondary* evidence. In the *State* v. *Martin*, 2 Ire. 120, it is held, "to be in the discretion of the prosecuting officer, what witnesses he will examine." "If other witnesses can shed more light on the controversy, it is competent for the prisoner to call them." We think, it was entirely proper for the Court to allow the Attorney General to make the interruption, and it was proper for that officer, seeing the prisoner's counsel had fallen into an error, to

set him right, and give him an opportunity to call the witness, if competent.

Another ground, upon which a new trial was asked was, that the prisoner, being *black*, was *prima facie* a slave, and, if a slave, the Court had committed error, in not admonishing the mulatto witnesses, as required by law. This point was not made until after the trial—it was then too late. If the prisoner wished to be tried as a slave, the question should have been started "in time." There was evidence to rebut the presumption, and he was treated as a free negro during the whole trial. It would be trifling with the administration of justice, to allow a prisoner to pass himself off as a free negro, and take his chances for a verdict; and then turn around and insist that he was a slave. Again, the Act of Assembly was intended for the benefit of the party, against whom mulattoes are called as witnesses, on the trial of slaves; consequently, the benefit may be waived, and the proper course is, to object to the competency of witnesses, before they give testimony, if they had not been admonished.

But again, it does not appear from the record, that the mulatto witness were not admonished. The record need not show *affirmatively* all the incidents of the trial. The trial is presumed to have been conducted regularly and according to law, unless the party excepts, and has the act of omission or commission, complained of, spread upon the record.

Another ground was taken in this Court, that, if the prisoner was a slave, notice should have been issued to his owner. The same reply is applicable to this objection; and further, it not appearing who the owner was, the Act provides, that the Court may appoint counsel and proceed with the trial, as if the owner had been notified.

There is no error in the record, and we presume this is one of the cases, where an unfortunate prisoner, avail-

ing himself of the Act of Assembly allowing appeals, without security for costs, *appeals without hope.*

PER CURIAM. Ordered to be certified that there is no error in the record.

HULDAH SNOW *vs.* WILLIAM J. WITCHER AND WIFE.

In an action of slander, when the charge is made directly, the plea of justification should aver the truth of the charge, as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to shew the meaning of the words, the plea should aver the truth of *the charge*, which the declaration alleges was meant to be made.

In an action of slander, by a single woman, under the Act of 1808, Rev. Stat. Ch. 110, where the words charged were "that she had lost a little one," "Z. S. is a credit to her," the said Z. S. being notoriously an incontinent person, and, "she better be listening to the report about herself losing a little one;" *Held*, that it was sufficient for the defendant to plead and prove that the plaintiff was an incontinent woman.

Appeal from the Superior Court of Law of Surry County, at the Fall Term 1848, his Honor Judge MOORE presiding.

This is an action on the case, under the Act of 1808, for a charge of incontinence. The first count alleges, that the defendant Judith, who is the wife of the other defendant, made the charge by using the words: "she had lost a little one." The second count by using the words: "Zilphy Sims is a credit to her," Zilphy Sims being a woman, whose general character was that of a base, lewd and incontinent person. The third count, by

using the words: "She better be listening to the report about herself losing a young one."

The defendants pleaded justification, and, on the trial, introduced a witness, who swore that he had, on several occasions, had criminal intercourse with the plaintiff. The Court charged, that the plea of justification should aver the truth of the charge, as laid in the declaration, and that this evidence, if believed, did not establish the plea.

There was a verdict for the plaintiff and the defendants appealed.

No counsel for the plaintiff.

Boyden, for the defendants.

Pearson, J. Assuming that the declaration contains a colloquium and introductory matter, sufficient to warrant the inuendoes, we think, the Judge erred in holding, that the evidence, if believed, did not make out a justification. When the charge is made directly, the plea should aver the truth of the charge, as laid in the declaration; but, when the charge is made by insinuation and circumlocution, so as to make it necessary to use introductory matter to give point to and show the meaning of the words, the plea should aver the truth of *the charge*, which the declaration alleges was meant to be made. If the words are "Brittain is as deep in the mud, as Welch is in the mire," and the declaration, with proper introductory matter, alleges, that these words were meant to make a charge of passing counterfeit money, the plea should aver, that the plaintiff was guilty of passing counterfeit money. In this case, the declaration alleges, that the words used were meant to make a charge of incontinence, and the plea should aver, that the plaintiff was incontinent, which averment would be fully proved, by the evidence of the defendants' witness, if believed. His

testimony, if true, showed that the plaintiff was not one of those "innocent," chaste women, whose "unsullied purity" the recital declares it was the intention of the Act to protect.

But it is insisted, that the words: "she had lort a little one," not merely charge, that the plaintiff was incontinent, but that she had brought forth a bastard child, and that the plea should aver this fact, and the evidence show it to be true.

Conception and delivery are the mere effects of nature —there is no harm in them *"per se."* The guilt lies in the criminal intercourse, which is made neither greater nor less by the collateral circumstances of conception and delivery, although these circumstances may be considered unfortunate, as leading to detection and exposure. Criminal intercourse is the gist of the charge, and is all that the plea need aver, or the evidence establish.

The learned Judge erred in holding, that conception and delivery, which are in themselves innocent, constituted a part of the substance of the charge, and ought to have been averred and proved.

In the second count, the charge is, that the plaintiff was a "base, lewd and incontinent woman." The words "base and lewd" are not actionable, for "lewd" means "lustful, libidinous;" but does not import criminal indulgence; so that "incontinent" is the actionable word," which, by the evidence, was established.

In the third count, the charge is, "she better be listening to the report about herself losing a young one." The defendants are not called upon to prove, that there was such a report, nor would it avail them as a justification, if they did. They must aver and prove the matter, alleged to have been reported, to be true, to-wit: that the plaintiff was incontinent and unchaste.

The *gravamen* of the action is a false and malicious charge of incontinence and a want of chastity.

It is unnecessary to allude to the other points made.

The judgment must be reversed and a *venire de novo* be issued.

PER CURIAM. Judgment accordingly.

DEN ON THE DEMISE OF ADDERTON & AL. *vs.* MATTHIAS MELCHOR.

In an action of ejectment, where the declaration contained several counts, some of which were on the demises of persons, who had died before the action was brought; *Held*, that the Court below did right in ordering these counts to be stricken from the declaration.

Appeal from the Superior Court of Law of Stanly County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

The declaration in this action of ejectment had many counts. Among others, there were counts on the several demises of John and Thomas Carson, and William Moore, laid in the year 1796. At the return term, Spring of 1848, the defendant, upon affidavit, that the said John, Thomas, and William, were dead, and had died as far back as the year 1810, obtained a rule to show cause, why the counts, upon their demises, should not be struck out of the declaration. The plaintiff alleged, that the other lessors claimed under the said John, Thomas, and William. Upon argument, the rule was made absolute, and the plaintiff appealed.

Strange, for the plaintiffs.

No counsel for the defendant.

Pearson, J. There was no error in making the rule absolute. Indeed, the counsel for the real parties admits, that the idea of laying a demise in the name of one, who had died many years before the institution of the suit, was an "experiment." The experiment ought not to have succeeded. It was obviously an attempt to pervert a fiction of law from its true purpose and intent. The proper time for making the motion was at the appearance term, but the Court should, at any time, (at least before verdict,) have allowed the application, and should have permitted the plea and consent rule to be withdrawn, if necessary, to enable the defendant to make the motion.

The action of ejectment is admirably adapted to try questions of title to land, and the fiction of "lease, entry, and ouster" is a beautiful illustration of the fact, that a fiction of law "works wrong to no one," and is never introduced into legal proceedings, except for the purpose of avoiding useless delay and expense, and furthering the ends of justice. It is true "John Doe and Richard Roe" are very much abused by persons, who are not well acquainted with them, but they are deservedly favorites with those, who have cultivated their acquaintance. No one, who comprehends the full scope and object of the fiction, can fail to be struck with it, as an enduring monument of the wisdom and clear sightedness of the fathers of our law.

After it became common for freeholders, instead of bringing *real actions*, to enter upon the land and make leases for years, so that the lessees might bring ejectment, it occurred to the Courts, that the fact of making the "entry and lease" was unnecessary, and was attended with useless expense and delay. How was this to be

avoided? If the lease and entry were supposed, and the action was brought against the tenant in possession, he had a right to enter his plea, and could not be called on to make any admissions. The expedient adopted was, to bring the action against the *casual* ejector; let him give notice to the tenant in possession; who, when he applied to be made defendant, might be required to admit "lease, entry, and ouster," as a condition of his being allowed to defend. He had no right to complain—he was not required to admit any thing, that would prejudice his right, but, simply, to admit those things to have been done, which the lessor might easily have done, by increasing the trouble and expense. But to require him to admit a thing, which could not have been done, at the institution of the action—for instance that a lease had been made by a *dead* man—would be unreasonable. The proposition would have shocked Chief Justice ROLLE, who, nearly two centuries ago, had the honor of inventing the action of ejectment in its present form. *Blackstone's Com.* 3 *vol.* 199, 207.

Besides being unreasonable, as requiring the admission of an impossibility, it would be a palpable violation of a fundamental principle of the action of ejectment. "The lessor must not only have title, at the date of the demise, but must have title and a right of entry at the commencement of the suit." At the death of the proposed lessors, the title passed out of them to their heirs or some one else. When this action was instituted, the dead lessors had neither title nor right of entry.

The decision of the Court below must be affirmed.

RUFFIN, C. J. Besides the reasons given by my brother PEARSON for affirming the judgment, there are others, which render it plain, that the counts in question ought not to be suffered to remain in the declaration.

There is no instance, in which a count on the demise of a person, who was dead at the time of bringing suit, has been sustained; and it is contrary to reason, that it should be.

If there were a verdict for the plaintiff on those counts, who could be put into possession under it? Very clearly, the lessors of the plaintiff in the other counts could not; for, the titles of the several lessors in the different counts are distinct and independent, and hence the necessity of laying the various demises in different counts. It is true, indeed, if a lessor of the plaintiff die pending the action, that does not affect the proceeding, but the case goes on to trial on the demise to the plaintiff, which the lessor, since dead, was capable of making as it is laid, and when the suit was brought. In such a case, therefore, there can be no difficulty in permitting the lessor's heirs or devisees, on a title thus accruing *pendente lite*, to proceed in the name of the plaintiff of record to execution. But that can never authorise a person to bring a suit on the supposed demise of a person, who was dead at the time, instead of doing so on his own. If the person, actually instituting the action, have a connection with the dead person, he must have derived his title or claim from him before the suit was brought; and therefore there is no occasion for using the dead man's name, instead of his own, or in addition to it. If, on the other hand, he cannot deduce title from the dead person, upon what possible ground can he assume to use his name to disturb the party in possession, who has the right to continue in possession against all but the real owner? It is obvious, indeed, if the other lessors of the plaintiff could recover and take possession under the imaginary demises of the dead persons, that the present defendant would then have just the same right to bring suit immediately against those other parties, on the demises of the same dead persons, and, thus, in turn evict them. The ab-

surdity of such a seesaw shows the impossibility of allowing such an abuse of the legal fictions in ejectment, as was here attempted.

PER CURIAM. Ordered to be certified accordingly.

DEN ON DEMISE OF THOMAS ETHERIDGE & AL. *vs.* SOLOMON ASHBEE.

Where a deed of a married woman had on it only the following entries as to its probate: "State of North Carolina, Currituck County, February Term 1832. Personally appeared Lydia Cook, wife of John Cook, and in open Court acknowledged that she assigned the within deed of her own free will without any constraint whatever. Let it be registered. (Signed,) W. D. Barnard."

"STATE OF NORTH CAROLINA, }
Currituck Sessions, February Term 1832. }

"This deed from John Cook and Lydia to *Samuel Forebee*, was exhibited and proved in open Court, by John L. Scurr, subscribing witness. At the same time Lydia Cook, the *feme covert*, personally appeared in open Court, and being privately examined by W. D. Barnard, one of the Court appointed for that purpose, who reported, that the said Lydia Cook acknowledged the execution of said deed of her own accord and without any constraint whatever, &c. On motion ordered to be registered.

(Signed,) S. HALL, C. C. C."

And there was also the following entry on the minute docket of the same term: "A deed from John D. Cook and wife Lydia to Wm. C. Etheridge was proven as to John Cook and wife by the oath of John Scurr, a witness thereto, and her private examination taken in open Court. Ordered registered."

Held, that these entries afforded no evidence that the wife had been privily examined, as required by law.

Appeal from the Superior Court of Law of Currituck County, at the Spring Term 1849, his Honor Judge MANLY presiding.

Both parties claim under Lydia Cook, the wife of John Cook. It is admitted, that if a deed from Cook and wife to William C. Etheridge is valid to pass the title of Lydia Cook, then the plaintiff is not entitled to recover. If the deed be not valid, then the plaintiff is entitled to recover.

The deed is in the usual form, signed and sealed by both Cook and Lydia Cook, attested by John L. Scurr. Upon the back of the deed, are the following endorsements:

"STATE OF NORTH CAROLINA, }
Currituck County, February Term 1832. }

"Personally appeared Lydia Cook, wife of John Cook, and in open Court acknowledged, that she assigned the within deed of her own free will, without any constraint whatever. Let it be registered.

W. D. BARNARD, [J. P."]

"STATE OF NORTH CAROLINA, }
Currituck County, February Term 1832. }

"This deed from John Cook and Lydia Cook to *Samuel Ferebee*, was exhibited and proved in open Court, by the oath of John L. Scurr, subscribing witness. At the same time, Lydia Cook, the *feme covert*, personally appeared in open Court, and being privately examined by W. D. Barnard, one of the Court, appointed for that purpose, who reported, that the said Lydia acknowledged the execution of the said deed of her own accord, and without any constraint whatever, &c. On motion ordered to be registered.

"S. HALL, C. C. C.

"Registered, May 15th, 1832.

"THOS. S. LAND, P. R."

On the docket of the Court of Pleas and Quarter Sessions for Currituck February Term 1832, was the follow-

ing entry: "A deed from John D. Cook, and wife Lydia, to William C. Etheridge, was proven, as to John D. Cook and wife, by the oath of John L. Scurr, a witness thereto, and the private examination taken in open Court and ordered to be registered."

A verdict was returned for the plaintiff, subject to be set aside and a non-suit entered, should the Court be of opinion, that the deed was valid to pass the title of Lydia Cook. The Court, being of that opinion, directed the verdict to be set aside, and a non-suit entered. The plaintiff appealed.

Heath, for the plaintiff.

Jordan, for the defendant.

PEARSON, J. His Honor was of opinion, that the deed was valid to pass the title of Mrs. Cook. With every disposition to give effect to the deeds of *femes covert*, we cannot concur in that opinion. The privy examination was not taken as the law requires.

Suppose W. D. Barnard was a member of the County Court, appointed to take the privy examination of Mrs. Cook, his certificate is not, that she was privily examined by him, but that "*in open Court* she acknowledged," &c.

So, the certificate of the Clerk is inconsistent and repugnant, as endorsed on the deed. It says: "this deed from John D. Cook and wife Lydia to *Samuel Ferebee*, was exhibited," &c. This is inconsistent, for the deed, upon which the endorsement is made, is a deed from John Cook and Lydia Cook, his wife, to *William C. Etheridge*. The description is wrong, or else the endorsement is made on the wrong deed.

Again, it says: "Lydia Cook, being privately examined by W. D. Barnard, one of the Court, appointed for that purpose, who reported, that she acknowledged the execution of the said deed," &c. It is not stated, that Barnard

reported, that upon *her privy examination before him*, "she acknowledged," &c. But suppose this is to be inferred from the certificate of the Clerk. Then it is repugnant; for, the certificate of Barnard is, that she made the acknowledgment "*in open Court.*"

Nor, is it aided by the entry upon the docket; (admitting that the entry can be called in aid,) for the entry is, that the deed was proven, and "her *private* examination taken *in open Court.*" It is not stated, by whom the examination was taken, and for aught that appears, the husband was present.

We are of opinion, that the deed was not valid to pass the title of Lydia Cook.

The judgment must, therefore, be reversed, and a judgment be entered for the plaintiff, according to the verdict.

PER CURIAM. Judgment accordingly.

THE STATE *ex.* EDWIN ROBBINS.

In an indictment for selling to a slave in the night time, it is not necessary to negative an order of the owner or manager, the offence having been committed in the night time.

In such an indictment, the slave is sufficiently identified by his name; a further description, by giving the name of the owner, is not necessary.

The case of *The State* v. *Miller*, 7 Ire. 725, cited and approved.

Appeal from the Superior Court of Law of Edgecombe County, at the Spring Term 1849, his Honor Judge SETTLE presiding.

The defendant was tried and convicted upon the following indictment, to-wit:

"STATE OF NORTH CAROLINA, } Superior Court of Law,
Edgecombe County. } Fall Term, 1848.

"The jurors for the State, upon their oath, present, that Edwin Robbins, a licensed retailer of spirituous liquor, by a measure less than a quart, late of the County aforesaid, at and in said County, on the first day of September in the year eighteen hundred and forty-eight, and in the night time of said day, between the hours of sunset thereof and sunrise of the day next ensuing, to a slave, named Sampson, one pint of spirituous liquor unlawfully did sell and deliver, to the common nuisance of the good citizens of the State, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

(Signed,) MOORE, Atto. Gen'l.

On motion of the defendant, the judgment was arrested, and the Attorney General appealed.

Attorney General, for the State.
No counsel for the defendant.

PEARSON, J. There is no ground, upon which the judgment ought to be arrested. On the contrary, the Attorney General has framed an indictment, unencumbered by useless words; which, from its brevity and clearness, may well be adopted as a precedent.

The averment, that the defendant "unlawfully did sell and deliver" to the slave, would not be supported by proof of a sale and delivery to the slave as the agent and for and on account of his owner; nor is it necessary to negative an order of the owner or manager, the offence having been committed in the night time. *State* v. *Miller*, 7 Ired. 725, decides both points.

The slave is sufficiently described by his name. A further description, by giving the name of the owner, is

not necessary. The law only requires "certainty to a certain intent in general" in indictments for this offence.

The Court below erred in arresting the judgment. There must be a judgment for the State.

PER CURIAM. Ordered to be certified accordingly.

THE STATE TO THE USE OF WILLIS F. REDDICK *vs.* GEORGE W. B. SATTERFIELD.

An infant, being entitled to a sum of money arising from the sale of a tract of land, sold under a decree of a Court of Equity, and the same having been received by her guardian, conveyed it by a deed of trust to her separate use, and if she died without leaving a child, to her intended husband. She married and died under age and without a child. *Held*, that in a Court of Law, at least, her personal representative was entitled to recover the money so received by the guardian.

Appeal from the Superior Court of Law of Gates County, at the Spring Term 1849, his Honor Judge MANLY presiding.

This was an action of debt on a guardian bond. Sarah Ann Hunter, the intestate of the plaintiff, and the ward of the defendant, in 1847, before her marriage, executed a deed, conveying all her estate, among other things the proceeds of the sale of a tract of land, sold under the decree of the Court of Equity for partition, which was in the hands of the defendant, her guardian, to a trustee for her separate use, and if she died without a child living at her death, then to the use of her contemplated husband, one Willis F. Riddick.

The intestate intermarried with the said Riddick, and had a child born alive, but it died before the intestate. At the date of the deed and at the time of her marriage, the intestate was about sixteen years of age. She died at the age of eighteen.

The breach assigned was a refusal to pay the amount of about $1000, the sum received by the defendant, as guardian, together with interest thereon from the 10th of May, 1840; at which time, the defendant, as guardian, had received the said amount, being his ward's share of the land, sold under the decree of the Court of Equity, for partition.

His Honor was of opinion, that the plaintiff could only recover the interest upon the sum received by the defendant, as guardian; and a verdict and judgment were entered for the plaintiff for the penalty of the bond, to be discharged by the payment of the sum of $549, which was the interest upon the sum received by the defendant.

Heath, for the plaintiff.

No counsel for the defendant.

PEARSON, J. We think his Honor was mistaken in the view, which he took of the case. Admit that the deed of the intestate was void by reason of her infancy, his Honor seems to have been under the impression, that the fund was to be treated as land, and that the plaintiff, as personal representative, could only recover the profits or interest up to the time of the death of the intestate, which, we presume, he considered was for the benefit of the husband, but that the principal belonged to the heirs at law.

Without deciding how the rights of the parties may be considered in a Court of Equity, we are of opinion, that in a *Court of Law*, the defendant, having received money belonging to his ward, was, after her death, bound to pay it over to her personal representative; and that his re-

fusal to do so was a clear breach of the bond to the amount of *principal* and interest.

The judgment must be set aside and a *venire de novo* issued.

PER CURIAM. Judgment accordingly.

THE STATE vs. JOSEPH BOGUE & AL.

Where several persons are indicted for a trespass, it is not a matter of right for any of the defendants to insist, on the trial, that the jury should be required to pass upon the guilt or innocence of any of the others, before they pass upon the whole. This is a matter of discretion in the presiding Judge —a discretion rarely, if ever, used, except in cases, where there is no evidence against a part of the defendants, or where the Court is satisfied, that persons are made defendants, to prevent their being examined in the case. From the exercise of a discretionary power in the Court, no appeal lies.

Appeal from the Superior Court of Law of Perquimans County, at the Spring Term 1849, his Honor Judge MANLY presiding.

The defendants were indicted for a forcible trespass in entering the yard of the prosecutor, and there shooting his dog. The prosecutor and his family, and a man by the name of Crothers, were present, and the latter was a witness for the State and examined before the jury. It was proved, that the three first named defendants came up first, and together entered the yard, and the three last came up together, soon after the entry was made, and stood while the dog was killed—one of them being the son of the first named defendant. Upon the closing of its

case by the State, the defendants' counsel moved the Court to direct the jury to pass upon the cases of the last named defendants, in order that the others might have the benefit of their testimony.

This was refused by the Court, and the case, being submitted to the jury as to all the defendants, they returned a verdict of guilty, as to the two first, and not guilty, as to the others. Judgment and appeal.

Attorney General, for the State.
No counsel for the defendants.

NASH, J. The error complained of, was in the refusal of the presiding Judge, to direct the jury to pass upon the case as required. The separation of the cases, after the jury was charged, was not a matter of right, as claimed by the defendants, but entirely one of discretion in the Judge—a discretion rarely, if ever, used, except in cases where there is no evidence against a part of the defendants, or where the Court is satisfied, that persons are made defendants to prevent their being examined in the case. An instance of this is, where the prosecutor includes in the prosecution unnecessarily all the persons, who were present, thereby cutting off from the accused every chance of bringing the truth of the transaction fully before the Court and jury. But even in that case, the Court will move with great caution in allowing the favor, and only for the purposes of justice. A prosecutor is not compelled to leave out any person he may honestly believe to be a party in a joint trespass, in order that he may be used by the other defendants; and, on the other hand, if he give no evidence against any particular person, so included, the Court may, in its *discretion*, direct the jury to pass upon his case; but even then, it is a matter of sound discretion. *Tidd's Pr.* 861, *Peake's Ev. 5th edition*, 148, and *1st Phil. Ev. 6th edition*, 68. It has been re-

peatedly ruled by this Court, that with judgments of the Superior Court, resting on discretion, we cannot interfere. But, in this case, we think there was not only some evidence against the defendants, in whose favor the motion was made, but strong evidence.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JOHN W. JOHNSON *vs.* WILLIS BRADLEY.

A., being tenant by the curtesy, sells land belonging to his wife, by deed of bargain and sale, in fee, with general warranty. *Held*, that the right of the heir of the wife to the land was not rebutted by the warranty.

Appeal from the Superior Court of Law of Edgecombe County, at the Fall Term 1848, his Honor Judge DICK presiding.

The action is for an undivided moiety of the premises described in the declaration.

On the trial the case was agreed as follows. The land descended in fee from John Williams to his two daughters Martha and Sally. Aaron Johnson purchased the share of Martha, and took a deed to himself in fee. He also married Sally and they had issue, the lessor of the plaintiff; and then the said Aaron, being in possession, sold the whole tract to the defendant, and conveyed it to him by a deed of bargain and sale, in fee, with general warranty. Sally, the wife, subsequently died; and Aaron by another marriage afterwards had several children, and died intestate in 1846. Land descended from him to

his children; of which the share of the lessor of the plaintiff was of the value of $175. The lessor of the plaintiff also received a distributive share of his father's personal estate to the amount of $300. The price and value of one moiety of the land purchased by the defendant was $200. In November 1847, the lessor of the plaintiff demanded of the defendant to be let into possession of a moiety of the land, as a tenant in common with him; but the defendant, claiming the whole tract as his own in severalty, refused to admit the lessor of the plaintiff into a share of the premises; and then this action was brought. The Court was of opinion for the plaintiff, and, from a judgment accordingly, the defendant appealed.

B. F. Moore, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. Were the case to be governed by the Statute of Gloucester, it would seem to be for the plaintiff. For, by that act, the warranty of tenant by the curtesy bars the heir from recovery of the mother's land, only when assets in fee simple descend from the father, regard being had to the value. Of course, that excludes all notice of the personalty, which came to the son from the father's estate. And, as to the realty, Lord COKE lays it down, that, to constitute a bar, "assets" must at the time of descent, be of equal value with the premises warranted, or more; *Co. Lit.* 374: which is not the case here. But that point is not to be considered at this day, as the statute 6 *Ed.* 1, *ch.* 1, is superseded by the subsequent inconsistent act of 4 *Anne., ch.* 16, *sec.* 21, which covers the whole ground. Indeed, in our Revisal, the Statute of Gloucester is omitted, and that of Anne alone re-enacted. No regard is had in it to assets. It enacts generally, that all warranties by a tenant for life shall be void, as against any person in reversion or remainder; and that all col-

lateral warranties by any ancestor, not having an estate of inheritance in possession, shall be void against his heirs. *Rev. St. Ch.* 43, *Sec.* 8. That is an express provision for the case before us; and, certainly, it promotes the justice due to all persons concerned. The statute avoids the warranties mentioned in it, as warranties, properly and technically speaking; that is, as real contracts of the ancestor, which rebut the heir or on which he may be reached; and it has no other effect. That is obvious, when it is noted, that those warranties are not absolutely void, but only against the reversioner, remainder man, or heir, claiming the land; and, therefore, that they are valid, as covenants, on which damages may be recovered, against the covenantor himself and his executors. It follows thence, that, as such covenants, they would bind the heir also to answer in damages for their breach, to the extent of assets descended. But, then, all the heirs would be equally and together liable; which would be just and equitable, instead of throwing the whole loss—at least, at law—on one of the heirs, by rebutting him from the recovery of his mother's land, as is attempted here. The statute works no hardship on the purchaser, as it leaves him an adequate redress in a personal action on the covenant; and it deals impartially between the covenantor's children by drawing the compensation for the breach of covenant from a fund, in which they are all equally interested, either as next of kin or heirs at law of the father

Per Curiam. Judgment affirmed.

JOHN STURDIVANT *vs.* EDMUND L. DAVIS, EX'R, &c.

Where a deed is absolute on its face, but it is alleged, that it was on a secret trust for the donor, with intent to defeat his creditors, it must be left to the jury to ascertain the existence of such trust. But where a deed, made without consideration by a debtor, expresses on its face that it is made for the benefit of the debtor and his family, the Court can itself pronounce it fraudulent and void as against a creditor then existing.

A fraudulent donee of personal property, which he has in possession after the donor's death, is answerable as executor *de son tort*.

The case of *Gregory* v. *Perkins*, 4 Ire. 50, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

This is an action of debt brought June 18th, 1844, against the defendant, as executor of Isham Davis deceased, on a bond given by him and Edmund McLindon for $100, dated March 13th, 1839, and payable one day after date. Pleas, former judgment, and *ne unques* executor.

In support of the first plea the defendant gave in evidence a warrant issued by a justice of the peace on the 14th of June, 1841, against Edmund McLindon and the present defendant, as executor of Isham Davis, deceased, purporting to be on a bond for $100: that it was returned "executed" by the constable; and that the magistrate gave a judgment thereon in the following words: July 10th, 1841. Judgment against the principal, Edmund McLindon, for $81 with interest from," &c. The defendant also called the magistrate, who gave the judgment, as a witness. But he stated, that he had no recollection of what took place at the trial, as to the defendant. The

Court held, that it did not appear, that there had been a former judgment between the present parties on this bond.

In support of the second issue on the part of the plaintiff, he gave evidence, that, on the 18th of May, 1834, Isham Davis conveyed to his son, the present defendant, in fee, a tract of land containing 116 acres, being the land, on which the father then resided and continued to reside until his death, and being all he had; and that the land was of the value of $700, and that the consideration expressed in the deed was fifty cents. And the plaintiff gave further evidence, that on the 5th day of November, 1839, by a deed, expressed to be made in consideration of the age and infirmities of himself and his wife, and their inability to attend to their own business, the said Isham conveyed to the defendant one bay horse, five head of cattle, twenty hogs, twenty-five sheep, his household and kitchen furniture, plantation tools, crops of corn, fodder, and other things (being all the property of the said Isham) in trust for the said Isham and his wife Elizabeth, and for their support at their usual place of abode. And it was thereby further agreed, that the said Edmund should move, and live with his father and mother, and manage all matters and things relative to the property thereby conveyed for their support and benefit. And the plaintiff gave further evidence, that Isham Davis died in 1841, and that, upon his death, the defendant held, used, and enjoyed the said personal property as his own.

The counsel for the defendant insisted, that there was no fraud in fact intended by the parties in the execution of the deed of November 1839, and that it was the province of the jury to judge thereof; and prayed the Court to instruct the jury, that, if they should be of that opinion, they ought to find for the defendant.

The presiding Judge refused so to instruct the jury; but directed them that the said deed for all the personal

property of the father was fraudulent in law, and that, consequently, the plaintiff was entitled to recover. Verdict and judgment for the plaintiff, and the defendant appealed.

Ashe, for the plaintiff.

Strange, for the defendant.

RUFFIN, C. J. There does not appear to be error in the opinion given by his Honor on either point.

Whatever may have been the intention of the magistrate at the time, it is certain that the judgment, as expressed, does not purport to be a determination between the plaintiff and the present defendant. Even if the defendant could be aided by evidence *dehors* the judgment, the witness, produced by him and examined, apparently without objection, gave none, which could affect the case. Indeed, the defendant seems to have failed to give evidence even to the essential point, that the bond, on which the former warrant was brought, is the same now sued on.

Whether the defendant be answerable as executor *de son tort*, was correctly made to depend on the question, whether the conveyance, under which he took and holds the personalty, be fraudulent against the plaintiff, as a creditor of the father; for, that is the only way in which the creditor can, after the death of his debtor, reach chattels fraudulently conveyed by the debtor. Therefore, it has been long settled, that the creditor shall have this action against a fraudulent donee. We hold that conveyance to be undoubtedly fraudulent, and that it was the duty of the presiding Judge so to pronounce it. A deed is declared by the law to be fraudulent and void, which is made with intent to defeat a creditor, or to hinder him, or delay him. Generally speaking, a deed made by one person to another simply and absolutely, is, *prima facie*, to be taken as *bona fide* and made upon due consideration,

as expressed in the deed, and for the benefit of the person to whom it is made. But, if it was not, in fact, made for the benefit of that person, but for that of the maker of the deed, or, without any valuable consideration, for the benefit of some member of his family, it is obviously unjust and fraudulent, if, thereby, a creditor, existing at the time, is prevented or delayed from obtaining satisfaction of his debt by process of execution. Ordinarily, the benefit intended for the donor and his family is not expressed in the deed, but rests in a secret confidence or trust; and the reason is, that their interest may be concealed and the creditor thus deprived of evidence of its existence. In such cases the creditor is compelled to have recourse to such extraneous proof as he can make of the secret trust for the donor; and, of course, the question, thus depending upon proof by witnesses, must be left to the jury. But it is, then, only left to them as to the existence of the supposed trust, and not to the effect of it. For, if the jury find that the deed was not truly made for the benefit of the donee, as it purports to have been, but for that of the donor or his family, it is a matter of law, that it is fraudulent, and the Court is bound so to tell the jury. For, if the deed stand, the creditor cannot take the property upon execution, although his debtor have the whole benefit of it; and, therefore, he could not have any motive for thus parting with the legal title, but to create an impediment to the creditor. The case then plainly falls within the very definition of fraud. When, however, the parties do not even conceal the trust, but set it out in the deed itself, there is nothing to be left to the jury. The deeds speaks plainly the fact, which in the other case was a subject of enquiry for the jury. and on the finding of which the instruction followed, that the deed was fraudulent within the statute; and when the deed thus discloses the trust, it is alike the province and the duty of the Judge to declare that in law it is fraudulent. *Gregory*

v. *Perkins*, 4 Ire. 50. It was said, indeed, at the bar, that the defendant had no bad intent in accepting this conveyance, but, on the contrary, the pious and benevolent one of obeying and serving his parents; and, therefore, that he ought not to be branded with fraud, but his conduct left to the charitable construction of a jury. But that argument is founded on a misconception of the nature of fraud in the eye of the law. It is very certain that, in many cases, that, which is deemed a fraud in law, is perpetrated upon motives much less base than it is in others; and the present may be stated as an example of conduct the least criminal in a moral point of view, among cases of the kind. Still, it is illegal, and a prejudice to honest creditors, and to that extent, at least, immoral. For, it is a contrivance, which, if successful, would protect the property from being reached by execution at law, although the owner of the legal title took no beneficial interest in the property, but the whole was secured to the debtor. It is true, that by the Act of 1812, such trusts may be sold on execution. Yet it may be a serious question, whether the deed is not in all cases to be viewed as fraudulent, when the trust declared is for the maker himself, although the judgment and sale under execution be in the debtor's lifetime, as the purchaser may be embarrassed in equity by accounts between the trustee and his *cestui que trust*. But, however that may be, it seems certain, that it may be so treated when the debtor is dead before judgment. For, after the debtor's death, the only way in which the debtor's property can be reached, is by treating the trustee in possession as executor *de son tort*; because in no other way can a judgment be obtained establishing the debt, and authorising process against the property, as that of the deceased debtor. So that, unless it can be reached in that way, upon the ground of the fraud, the creditor would be without any remedy at law in such case.

It was further contended for the defendant, that the Act of 1840, ch. 28, sec. 4, restrains the Court from pronouncing the deed fraudulent in law, and that in all cases the question is to be left, as one of actual intent, to the jury. But that is only so, when the donor is not indebted at the time of the conveyance, or retains property sufficient and available for the satisfaction of all the creditors he then had. When sufficient property is thus retained, then the intent, as a matter of fact, is for the jury as to the creditors, as it is in all cases, by the second section, as to purchasers. But here the debt had been previously contracted, and the case states that the donor had no property, real or personal, but that conveyed to the son. The conveyances therefore cannot but be fraudulent under those circumstances.

PER CURIAM. Judgment affirmed.

WALTER BURNES *vs.* BENJAMIN ALLEN.

A promise, made *after* a covenant, is merged, upon the same ground that a promise, made *before*, is merged, when the promise and the covenant are precisely the same, because the covenant, being a deed, is the surest and highest evidence.

The case of *Wilson* v. *Murphy*, 3 Dev. 352, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

This is an action of assumpsit. In 1839, the plaintiff purchased of the defendant a tract of land, and the de-

fendant executed a deed with a covenant of general warranty. Upon a survey, afterwards made, it was found that twenty-two and a half acres of the land were covered by the plaintiff's title, and sixteen acres by the title of one Parker. All the promises are barred by the statute of limitations, except that proven by the testimony of one Turner. He swore, that in March 1843, he heard a conversation between the plaintiff and defendant, in relation to the land, when the defendant said: "he did not wish to be sued, he was willing to do what was right, and would be up, on a certain day, to see the plaintiff and settle with him."

His Honor charged, "that the plaintiff had a cause of action upon the covenant, and, if the jury believed from the testimony of Turner, that the defendant promised to pay the plaintiff for the land, as to which the title was defective, because of forbearance to sue until a given day, the plaintiff was entitled to recover in this action, and was not obliged to sue on the covenant."

A verdict was rendered for the plaintiff and from the judgment thereon the defendant appealed.

Winston, for the plaintiff.

Strange and *Iredell*, for the defendant.

PEARSON, J. We think his Honor erred. Admit there was a cause of action upon the covenant; admit also, that to "settle with him" meant to pay the value of the land, as to which the title was defective, (about both of which propositions we have serious doubts;) this was a promise to do *precisely* what the covenant bound him to do. A promise, made *after* a covenant, is merged, upon the same ground, that a promise, made *before*, is merged, when the promise and the covenant are *precisely* the same; because the *covenant*, being *a deed*, is the surest and highest evidence.

An obligor promises the obligee to pay the amount of a bond, if the obligee will forbear to sue. No action lies upon the promise, because it is merged in the bond, being a promise to do precisely the same thing, which his bond obliges him to do.

In *Wilson* v. *Murphy*, 3 Dev. 352, there was a covenant in the lease, that the lessor would pay for all the necessary rails made and put on the fence, at the price of fifty cents per hundred. The parties had a settlement, ascertained the number of rails, and the amount due for them, at fifty cents per hundred, and the defendant (the lessor) promised to pay the amount. In an action on the promise, it was decided against the plaintiff, because the action ought to have been on the covenant; and the opinion states, that no case can be found, in which, the performance of a duty being secured by deed, and the deed remaining in full force, an action was maintained upon a promise to perform the duty; for, precisely the same evidence will support both actions, and for the certainty of the contract, the *specialty* ought to be taken rather than the verbal agreement. No action will lie on a promise merged in the existing deed, for the same reason, that it will not lie on a promise merged in a deed or judgment subsequently taken for the same debt.

It is true, in this case, there was a new consideration, the forbearance; but there was already a sufficient consideration, and the new consideration was merely surplusage, unless the promise was to do a thing, not already provided for by the covenant—as if the amount of damage had been fixed at a certain sum, to be paid at a certain time; in which case the promise would have been to do a thing not precisely provided for by the deed. In the case of *Wilson* v. *Murphy*, if the covenant had been to pay for the necessary rails, *no price being fixed*, and the parties had agreed upon the number and *price*, an action would have been maintainable upon the promise, for the

promise fixed the price, which was not provided for by the covenant.

In this case, the promise is to do "what is right and to settle." Nothing is fixed. All is left *precisely*, as provided for by the general words of the covenant.

PER CURIAM. A *venire de novo* awarded.

WILLIM SNOWDEN & WIFE vs. WILLIAM F. BANKS, EX'OR.

A. bequeathed a negro woman to his daughter, and afterwards sold her, and kept the amount received from the sale, as alleged by the petition, to be given to the daughter, in lieu of the negro sold; but he made no alteration in his will. *Held*, on demurrer to the petition, that the daughter had no right to the price of the negro.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term 1849, his Honor Judge MANLY presiding.

This was a petition filed originally in the County Court and carried by appeal to the Superior Court, in which the facts were alleged as follows.

Richard Wadkins bequeathed to his daughter, Mrs. Snowden, a negro woman, named Ary; and then, in his life time, he sold her for the sum of $325. This is a suit brought by the daughter against the executor for the $325; and the petition states, that the testator sold the negro "for some good and sufficient cause, and not for the purpose of defeating the interest of the plaintiff in the same, and that he kept the said sum of $325 in his possession

and did not dispose thereof, but intended it should be given to the plaintiff under his will, in the place of the woman Ary." Upon demurrer, the petition was dismissed, and the plaintiff appealed.

No counsel for the plaintiffs.
Heath, for the defendant.

Ruffin, C. J. The gift is specific of a particular negro by name. Of course, if the testator had no such negro, the gift would necessarily fail. It is equally well settled, that, if he had the thing at the making of the will, and it be afterwards destroyed, or disposed of by the testator, the legacy likewise fails by what is called an ademption. There is in neither case any thing to answer the description in the will; and therefore the will passes nothing. It is said, indeed, that this testator kept the identical money got for the negro, and intended the daughter to have that, instead of the negro. That is very probable; but, if it were true, the testator never put that intention into the will, so as to become a part of it, and enable the plaintiff to make this claim under a testamentary disposition—as she must do in this suit. It is impossible, that, under the gift of a specific negro, a sum of money can pass; and therefore no intention to that effect can be averred against the express words of the will.

Per Curiam. Decree affirmed with costs.

THE STATE *vs.* WILLIAM W. McCAULESS AND AUGUSTUS MARTIN.

The gist of the offence of forcible trespass is a high handed invasion of the possession of another, *he being present*—title is not drawn in question.

If two are in the same house, the law adjudges the possession in him, who has title; but not so, as, by relation back, to make the other guilty of a forcible trespass, when the entry was without force.

Where there are two counts in an indictment, one good and the other defective, and there is a general verdict against the defendants, the judgment will be presumed to have been given upon the good count alone. But when both counts are good and the Court gives erroneous instructions to the jury as to one of the counts, it is presumed that the judgment was given upon both counts, and a *venire de novo* will be awarded.

Appeal from the Superior Court of Law of Surry County, at the Spring Term 1849, his Honor Judge ELLIS presiding.

The indictment contains two counts: one, for a forcible trespass into the house of the prosecutor; the other for an assault and battery.

In March 1847, the prosecutor let the house and field to one Mitchell to make a crop. Mitchell transferred his interest in the premises to Mrs. Mitchell, his mother, who took possession and lived in the house until November 1847, when she let the premises to the defendant McCauless, for the balance of the year.

The prosecutor, on the night before the alleged trespass, went to the house, while Mrs. Mitchell was still living in it, and entered, but without force, and slept there on a bed, which he carried there for the purpose. In the morning, being the 1st day of November, he went off, announcing his intention to go and get other household property and bring it to the house. While he was gone, the

defendants came and entered with the permission of Mrs. Mitchell. The prosecutor returned and came into the house. In a short time his sons arrived with his household property, and were in the act of bringing it into the house, when the defendants objected, and tried to prevent it by shutting the door. This was opposed by the prosecutor, and a fight ensued between the prosecutor and the defendants.

His Honor instructed the jury, that Mitchell, and those claiming under him, were not entitled to the premises for the entire year, but only up to the usual time for making and gathering a crop, and, if that time had expired when the prosecutor entered, his entry was lawful, and the defendants, according to the evidence, were guilty of a forcible trespass, notwithstanding they had entered the house, while the prosecutor was absent, with the permission of Mrs. Mitchell, and claiming under her.

The defendants were found guilty on both counts. Motion for a new trial was refused; judgment for the State, and the defendants appealed.

Attorney General, for the State.

No counsel for the defendants.

Pearson, J. The gist of the offence of forcible trespass is a high handed invasion of the actual possession of another, *he being present*—title is not drawn in question. According to the evidence in this case, Mrs Mitchell was, on the morning of the first of November, in possession of the house. The defendants entered with her permission and acquired the possession from her, in the absence of the prosecutor, and, although he came afterwards and entered into the house, and the defendants there opposed his bringing in his household goods, it did not make them guilty of a forcible trespass. It may be they were guilty of a forcible detainer.

If two are in the same house, the law adjudges the possession in him, who has title; but not so, as, by relation back, to make the other guilty of a forcible trespass, when the entry was without force.

We think his Honor erred in the instructions given.

It is insisted, that the defendants, being properly convicted upon the second count, that will sustain the judgment, notwithstanding the error in the charge in reference to the first count. It is true, when one count in an indictment is defective, and another count is good, and there is a general verdict, a motion in arrest cannot be sustained; for, the good count warrants the judgment, and, although the punishment is *discretionary*, the judgment is presumed to have been given upon the good count.

In this case, both counts are good. There was error in the instruction given on one of the counts, by reason whereof the defendants were improperly convicted upon that count, and are entitled to a *venire de novo*; for, as his Honor thought the conviction was proper on both counts, and both counts are good, we must presume, that the amount of the fine imposed was fixed on, in reference to both counts; whereas, if the defendants had been acquitted upon the first count, as they should have been in our opinion, the punishment would have been imposed, in reference to the last count only, which was much the less aggravated offence. Indeed, the attention of the Court and jury seems to have been directed exclusively to the first count; and the Court believing, that, according to the evidence, the defendants were guilty upon that count, it made no difference how the jury found upon the second count, which was included in the first.

PER CURIAM. Let there be a *venire de novo*.

LAW LIBRARY OF University of MICHIGAN.

THE STATE *vs.* PLEASANT BLACK & &L.

Under the statute against gaming, Rev. Stat. ch 34, sec. 69, the place of gaming and the place of retailing must be the same house, or, at the least, parts of the same establishment. "The premises" mean those places only, which are occupied by the retailer with the house in which he retails, as one whole.

Appeal from the Superior Court of Law of Rockingham County, at the Spring Term 1849, his Honor Judge DICK presiding.

Pleasant Black and four others were indicted for playing at cards together and betting money thereon, in a house situate on premises occupied by Marshall S. Black, in which he retailed spirituous liquors.

On the trial, the evidence was, that the defendant Pleasant Black owned two adjoining lots in the village of Madison, Nos. 28 and 29, fronting on the same street. He occupied both as one tenement: his dwelling house being on one of them, and on the other a store or shop, situate on the street on front, and a barn and stables, situate on the back lines. He let the shop to Marshall S. Black, who retailed merchandise and spirituous liquors therein, and who was also to have the privilege of a place near the shop for laying his fire wood. But Pleasant Black continued to occupy all the other parts of both of the lots as he had done before, including the barn and stables; and the gaming, charged in the indictment, was in the barn.

The counsel for the defendants moved the Court to instruct the jury, that if Marshall S. Black had no power or control over the barn, in which the gaming took place, the defendants were not guilty. But the Court refused

to give that instruction, and directed the jury, "that under the Act of Assembly, the defendants were guilty, if they played in a house situate on the premises, on which the retail shop stood."

The defendants were accordingly convicted, and after sentence they appealed.

Attorney General, for the State.
Morehead, for the defendants.

RUFFIN, C. J. The statute makes it a misdemeanor to game at cards "in a house where spirituous liquors are retailed, or in any out-house attached thereto, or any part of the premises occupied with such house." *Rev. St. ch. 34, sec. 69.* The next section makes the retailer indictable for suffering such gaming in his house or any part of his premises. This language renders it perfectly clear, that the place of retailing and the place of gaming must be the same house, or, at the least, parts of the same establishment. "The premises" mean those places only, which are occupied by the retailer with the house in which he retails, as one whole. They cannot include a place not occupied by him, nor even let to him. It is nothing, that the two places of retailing and gaming were once occupied together by some one, as parts of the same premises; for, if severed and occupied by different persons, when the gaming occurred, they were then not the same premises. That was the case here. The lessee's rights were restricted to the shop itself, with only the liberty of laying fire-wood near it; and the residue of both lots was occupied by Pleasant Black in severalty. Suppose he had leased the barn and stables to a third person. Clearly, each lessee would occupy his share in severalty; and it would be the same, as if he had sold and conveyed to each lessee his own particular premises in fee. The one would not be liable to be indicted for

gaming on the premises of the other; and, of course, persons gaming on one parcel, on which spirits were not retailed, would not be within the statute, although retailing was carried on upon the other. The case is the same, when the owner continued in possession of those parts of the lots, which he had not leased. They were his premises and not the lessee's. The barn could not be laid as Marshall S. Black's, in an indictment for burglary or arson. Indeed, the instruction assumed that he had no control over it; and it follows, necessarily, that it could not be a part of the premises occupied by him.

The judgment was therefore erroneous, and there must be a *venire de novo*.

PER CURIAM. Ordered to be certified accordingly.

JOHN G. SUTTON *vs.* HARDY ROBESON.

An offer to compomise is not evidence to charge the party on the original cause of action. But a concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it, whenever its stipulations or statements of facts become material evidence for him.

Appeal from the Superior Court of Law of Bladen County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

This is an action of debt on a former judgment, brought against the executor of Henry Robeson, deceased. Plea, payment by the testator.

On the trial, the defendant gave evidence, tending to prove that the testator had paid the judgment. In order to rebut that inference, the plaintiff offered in evidence, a written instrument, signed and sealed by the defendant, in the following words:

"Whereas there are several suits now pending in the Superior Court of law of Bladen County, wherein John G. Sutton is plaintiff and I am defendant, and the same have been settled between the said Sutton and myself: This may certify, that in consideration that the said Sutton will not attempt to receive the full amounts claimed by him in the said suits, I hereby agree with the said Sutton, that, in all the said suits, judgments for seven eighths of the amounts or sums claimed by said Sutton may be entered against me and for all costs; and the said Sutton agrees, that the said judgments for seven eighths shall be in full discharge of the whole amounts claimed."

To the admissibility of the instrument the defendant objected on several grounds. First, because, at a former term the plaintiff obtained a rule on the defendant to show cause why judgment should not be entered in this suit according to the agreement, and the same was afterwards discharged: which he contended was an adjudication against the validity of the said agreement. Secondly, that the agreement was obtained by fraud, and, if introduced, it would involve the trial of a collateral issue on that question. Thirdly, that it was a distinct cause for another action. The Court rejected the evidence, and a verdict was given for the defendant; and after judgment the plaintiff appealed.

Strange, for the plaintiff.

D. Reid, for the defendant.

Ruffin, C. J. The Court is of opinion, that the evidence was admissible. It was relevant to the issue, as an

agreement to pay part of a debt affords some presumption, that the party had not before paid it in full; and it was for the jury to judge of the force of the presumption, according to the situation of the parties, the evidence of actual payment, and the circumstances attending the execution of the agreement. The objections taken to its reception, at the trial, are entirely insufficient. It was very proper to discharge the rule for judgment, which the plaintiff had obtained, because the Court could not enforce the agreement in that way, against the will of the defendant. But that was not *res judicata*, that the agreement was not the deed of the defendant, or not duly executed. Indeed the ground for refusing the summary redress may have been, and probably was, that the Court ought not to determine those questions of fact, but leave the parties to a remedy, in which issues on them could be taken to the country.

We are somewhat at a loss to understand the second objection, in reference to a supposed collateral issue upon the mode of obtaining the agreement. We take it for granted, that the Court did not reject the agreement upon evidence that it was not fairly obtained; because that assumes, that its execution was proved and that it was impeached by other evidence; in which case the question was for the jury exclusively, as in every case, which involves the validity of an instrument, whether it be a deed on *non est factum* pleaded, or an acquittance offered as evidence in support of the plea of payment. We suppose, therefore, that the defendant founded his objection on his allegation, that a fraud had been practised on him in getting the instrument, and that the Court thought it best to exclude the agreement, because, if admitted, it would give rise to a controversy, or a collateral issue as it was called, on the truth of that allegation. But that is manifestly no reason for not receiving the paper, since that controversy arises in every case of a receipt offered or an ac-

knowledgment of indebtedness, as the party offering them must prove them in the first instance, and it is, of course, open to the other party to offer opposing evidence, and the jury must decide, under the direction of the Court, upon matters of law, upon the fact and sufficiency of the agreement.

There is as little in the third objection. For there is nothing inconsistent in having two securities for the same debt; and when one is given long after the other, it is evidence to a jury, that the debt was not paid before it was given, and that the first security is still subsisting.

The counsel for the defendant in this Court, indeed, yielded those objections, and took another: that the agreement was one of compromise, and therefore was not admissible. But we find no such rule of evidence. It is true, that an offer to do something by way of compromise is not evidence to charge the party on the original cause of action; for it is but a proposal of a peace offering, which was not accepted, and therefore ought not to bind or in any degree prejudice the proposer. But when the parties admit distinctly certain facts to be true, or where, instead of an unaccepted offer of compromise, there be an express and final agreement upon the matter, there is no reason, why either party should not be at liberty to insist on such admission or agreement, whenever it may serve his interest, as on any other admissions or agreements. The argument, which would exclude it as evidence here, would equally affect it in an action on the agreement; and yet it is one of the considerations of agreements most favored in law, that it was the compromise of doubtful rights. A concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it, whenever its stipulations or statements of fact become material evidence for him. Such seems to us to be the good sense which should determine the rule on this subject; and we

are happy to find that it was so held in a modern case in the Court of Exchequer in England. *Froysell* v. *Llewellyn*, 9 Price 122.

PER CURIAM. Judgment reversed and *venire de novo*.

THE STATE *vs.* WHITMEL DEMPSEY.

The term "free person of color," in our penal statutes, is to be understood in our law to mean a person descended from a negro, within the fourth degree inclusive, though an ancestor in each intervening generation was white.

Appeal from the Superior Court of Law of Bertie County, at the Spring Term 1849, his Honor Judge MANLY presiding.

The defendant was indicted as a free man of color for carrying arms without a license. On behalf of the State a witness deposed, that he formerly knew one Barnacastle, who was a very old man, and died some years before the institution of this prosecution: that the said Barnacastle lived many years in the neighborhood of the defendant and his father, and was well acquainted with the defendant's father and his family: and that he, the witness, heard Barnacastle say, that he knew the paternal great-grand-father of the defendant, who was called Joseph Dempsey, alias Darby, and that he was a coal black negro. To the admission of this evidence the defendant objected; but the Court received it.

The defendant then gave evidence, that the mother of Joseph Dempsey, the defendant's great grand-father, was a white woman, and that said Joseph was a reddish copper colored man, with curly red hair and blue eyes: that the said Joseph's wife was a white woman, and that they had a son, named William: that the said William also married a white woman, and had issue a son by her, named Whitmel: and that said Whitmel married a white woman, and they are the parents of the defendant.

Upon this evidence the counsel for the defendant moved the Court to instruct the jury, that, although the father of Joseph Dempsey was a negro, the defendant, nevertheless, was not a free person of color within the statute. But the Court refused to give that instruction, and instructed the jury, that, supposing Joseph Dempsey to be of half negro blood, the defendant, being his great grand-son, was in the fourth generation from negro ancestors, and therefore within the prohibition of the Statute.

The jury found for the State, and after sentence the defendant appealed, upon the grounds, that improper evidence was admitted, and that the jury was misdirected.

Attorney General, for the State.

No counsel for the defendant.

RUFFIN, C. J. The indictment is founded on the Act of 1840, ch. 30, which makes it a misdemeanor in "any free negro, mulatto, or free person of color," to carry about his person or keep in his house any shot gun or other arms, specified, "unless he obtain a license from the County Court." The only question at the trial was, whether the defendant was such a person as came within the description in the Act. The Court is not prepared to say, whether the evidence given by the State on that point be competent or not. The question is not one of pedigree in the ordinary acceptation of the term, as the

descent of the defendant from Joseph Dempsey was admitted on both sides, and the dispute was simply upon the fact, whether Joseph Dempsey was, as contended by one side, a negro, or a mulatto, that is, one begot between a white and a black, as contended by the other side. We are not aware, that hearsay from a stranger has been received as to a point of fact of that nature, and we are not disposed to say, it ought to be admitted, without further consideration. The Court does not, however, mean to intimate an opinion, that it is inadmissible; for, in our country, so little attention is paid to the registry of births and deaths and pedigree generally, as to make it extremely difficult, and in some cases impossible, to prove the blood of a person even for four generations in any other way. Necessity may therefore, perhaps, compel the admission of such evidence. The Court, however, is not called on to give to the point further consideration in this case, because we hold, that the defendant was properly convicted upon his own showing; which, therefore, rendered the first point immaterial, and in that way prevented an error on it from being prejudicial to the defendant, and a ground for reversing the judgment, as has been frequently ruled. For, if a party will not rely on an exception by itself, which he takes, but will go on and prove the case for the other side, and put the whole in his bill of exceptions, he must abide the consequences. It would be preposterous to disturb a conviction, which was proper, and must have been rendered independent of the alleged error, and upon the party's own proofs or admissions.

That the defendant was guilty, according to his own evidence and the construction placed on it by himself, we hold upon the same ground which his Honor took on the trial—namely: that the defendant was descended within the fourth degree from a negro ancestor, and so is within the Act. The evidence on the part of the defendant

did not carry the white blood of Joseph Dempsey farther back than his mother; and, admitting it to be mixed, it is a fair inference against the defendant, who is most likely to be cognizant of the truth and able to prove it, that Joseph Dempsey derived no white blood through his father. Indeed, the defendant contended for nothing of the kind on the trial, but prayed an instruction, which yielded in terms, that Joseph's father was a negro, and, consequently, that he must have been half and half, or a mulatto, properly speaking. That being so, and the great grand-father being, thus, in the first degree from a negro, the defendant is necessarily in the fourth degree; and that brings him within the Act, although the mother of each generation was a white woman. It is true, that the defendant is not a negro, who is a black person, entirely of the African race. Nor is he a mulatto, according to the proper original signification of the term, which has just been explained. And the Court could hardly undertake of itself to construe the expression "person of color," so as to bring one within the statutes, creating felonies, or otherwise highly penal, merely because he derived from some remote ancestor a tinge of color that was not white; and the judiciary could not be regulated by degrees in such cases, without some legislative authority. There is, however, abundant authority of that kind, which relieves the Court from all difficulty in this respect, by distinctly defining, who are mulattoes in our law or persons of color, as the subjects of our disabling or penal statutes. Thus in the Act of 1777, the evidence of "mulattoes or persons of mixed blood," namely, those "descended from negro ancestors, to the fourth generation inclusive," is made incompetent except against negroes, Indians, Mulattoes, or such persons of mixed blood. In a great number of States, "free negroes" and "mulattoes," and "persons of mixed blood," or "persons of color," are subjected to disabilities or punishment. They are to be found in the

Revised Statutes under several heads, but mostly under that of "slaves and persons of color;" and in the 74th section of that Act, taken from that of 1826, it is enacted, that "all free mulattoes, descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall come within the provisions of the Act." The Constitution, likewise, in the third section of the first article of the amendment, describes in the same manner the free mulattoes or free persons of mixed blood, who are not admitted to vote for representatives in the legislature. It is thus very clear, that the term "free person of color" in the Act of 1840, and in that of 1823, making it a capital felony for a person of color to make an assault with intent to commit a rape on a white woman, and in other penal statutes, is to be understood in our law, at this day, to mean a person descended from a negro within the fourth degree inclusive, though an ancestor in each intervening generation was white. Therefore this conviction and sentence ought to stand.

PER CURIAM. Ordered to be certified accordingly.

JAMES ALBRITTON, ADM'R. vs. WILLIAM SUTTON.

A testator devised as follows: "I give to my son, Benjamin D. Harper, all my estate after settling my debts, except the $300 above mentioned. If Benjamin does not live till of age, then I dispose of my estate as follows: I give to my sisters, &c." Benjamin died under age. *Held*, that he was entitled to the profits of the estate, (except the $300) during his life.

The cases of *Turner* v. *Whitted*, 2 Hawks, 613, and *Spruill* v. *Moore*, 5 Ired. Eq. 284.

Appeal from the Superior Court of Law of Greene County, at the Fall Term 1848, his Honor Judge SETTLE presiding.

Hugh J. Harper made his will and therein bequeathed $300 to Samuel W. Scarbrough, and then disposed as follows: "I give unto my son Benjamin D. Harper all my estate after settling my debts, except the $300 above mentioned. If Benjamin does not live till of age, then I dispose of my estate as follows: I give to my sisters, if alive, or their children, etc.: all to have an equal share."

The testator's estate consisted of land, negroes, and other chattels, and some debts, and cash. The defendant, Sutton, was appointed the guardian of the infant Benjamin, and in that character entered into the land, and also settled with the executor of the testator and received the slaves and other personal property on behalf of his ward. Benjamin afterwards lived several years, and then died under 21; and the plaintiff administered on his estate, and filed this petition, praying for an account of the profits of the estates, accrued during the life of his intestate, and payment of the balance, that might be found due, after deducting disbursments for the maintainance of the infant. The defendant put in a demurrer, which,

on argument, was over-ruled; and the defendant appealed.

Rodman, for the plaintiff.
J. H. Bryan and *J. W. Bryan*, for the defendant.

RUFFIN, C. J. The decree must be affirmed. For although it be a general rule, that when particular legacies are payable at a future day, the legatee is not entitled to interest before the day, yet there is an established exception to that, when the gift is to an infant child, and the parent makes no other provision for his maintainance in the mean while. *Crickets* v. *Dalby*, 3 Ves. 10. *Chamber* v. *Goldwin*. 11 Ves. 1. *Wynch* v. *Wynch*, 1 Cox 433. *Heath* v. *Perry*, 3 Atk. 101. *Sheledon* v. *North*, 3 Atk. 430.

But here the words plainly import an immediate gift of the whole estate, except a small pecuniary legacy, and vested it immediately in the son, but defeasible upon the contingency of his dying under 21; and in that case it is perfectly settled, that the legatee takes the profits, until the divesting of his estate by the happening of the contingency. *Nicholas* v. *Osborne*, 2 P. Wms. 419. *Shepherd* v. *Ingram*, 1 Amb. 448. *Skey* v. *Barnes*, 3 Meriv. 340. *Turner* v. *Whitted*, 2 Hawks. 613. *Spruill* v. *Moore*, 5 Ired. Eq. 284.

PER CURIAM. Decree affirmed with costs.

THE STATE *vs.* CÆSAR, A SLAVE.

If a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of man-slaughter, giving due weight to motives of policy and the necessity for subordination.

The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present and instantly kills the assailant, without, in like manner, evincing, by the means used, great wickedness or cruelty.

RUFFIN, C. J., dissented.

The cases of the *State* v. *Tackett*, 1 Hawks. 217, *State* v. *Hale*, 2 Hawks. 582, *State* v. *Will*, 1 Dev. & Bat. 121, *State* v. *Mann*, 2 Dev. 263, and *State* v. *Jarrott*, 1 Ired. 86, cited, commented on and approved.

Appeal from the Superior Court of Law of Martin County, at the Fall Term 1848, his Honor Judge DICK presiding.

This was an indictment for murder in the words and figures following, to-wit:

STATE OF NORTH CAROLINA, } Superior Court of Law,
Martin County, } Fall Term, 1848.

The jurors for the State, upon their oath, present, that Cæsar, a slave, the property of John Latham and Thomas Latham, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fourteenth day of August, A. D. eighteen hundred and forty eight, with force and arms, at and in the County of Martin aforesaid, in and upon one Kenneth Mizell, in the peace of God and the State then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said Cæsar, with a certain large stick, which he the said Cæsar in both his hands then and there had and held, him the said Kenneth Mizell,

then and there feloniously, wilfully and of his malice aforethought, did strike and beat, giving to him the said Kenneth Mizell, then and there, by striking and beating him as aforesaid, with the stick aforesaid, in and upon the left jaw and the left side of the neck of him the said Kenneth Mizell, one mortal bruise, of the breadth of two inches and of the length of six inches, of which said mortal bruise the said Kenneth Mizell from the said fourteenth day of August in the year aforesaid, until the fifteenth day of the same month in the year aforesaid, at and in the County aforesaid, did languish and languishing did live; on which said fifteenth day of August in the year aforesaid, the said Kenneth Mizell in the County aforesaid died: And so, the jurors aforesaid, upon their oath aforesaid, do say that the said Cæsar the said Kenneth Mizell, in the manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the peace and dignity of the State.

On which indictment, the prisoner being arraigned, pleaded not guilty.

The prisoner being put on his trial, the State first examined one Brickhouse, who stated, that he went, in company with the deceased, to Jameston, in the County of Martin, in the afternoon of the 14th of August, 1818: that the deceased and he (the witness) drank spirits in the town of Jameston, until they were both intoxicated: that they went to the house of Mr. Cahoon about dark for the purpose of staying all night: that he (the witness) and the deceased went to bed together, and, after sleeping some short time, he was awoke by the deceased, who proposed that they should get up and walk out: that they did so and crossed an old field and went into the town of Jameston: they had a bottle of spirits with them, and each took a drink while crossing the old field: that near a store house in Jameston they found two negro men lying on the ground: that the witness was not

acquainted with either of them, but had since learned, that they were the prisoner and a man named Dick: the witness informed the prisoner and Dick, that he and the deceased were patrollers, and he (the witness) took up a piece of board and gave the prisoner and Dick each two or three slight blows: that he (the witness) then entered into a conversation with the prisoner and Dick, and, while conversing with them, a third negro came up, who, he has since understood, is named Charles: that he (the witness) asked Charles if he knew they were patrollers, and took hold of Charles and ordered Dick to go and get a whip for him to whip Charles with: Dick went off a few steps and stopped: witness let Charles go and took hold of Dick: witness then received a violent blow on his head, which made a wound about an inch in length, and stunned him: when he recovered, he saw the deceased lying on the ground at full length and the negroes all gone: witness called the deceased, but received no answer: witness then went to the house of Cahoon to get a gun, but failing to do so, returned where he had left the deceased, and found the deceased some twenty yards from where he left him: deceased was lying on the ground: the deceased got up and took his (witness') arm and witness conducted deceased to the house of Cahoon: deceased asked for some water, which witness procured for him, and he and the deceased went to bed together: after they were in bed, the deceased asked witness, if he would go with him on Thursday night after the negroes, and further remarked, that he could not talk much longer. Witness further stated, that, being considerably intoxicated, he fell asleep and was awoke about two or three o'clock in the morning by Mr. Cahoon. The deceased was dying, and *blood and froth* running out of his mouth and nose on the pillow where he lay. Deceased died in a few minutes after witness awoke.

The slave Dick was next examined on the part of the State. Dick stated, that he and the prisoner were lying on the ground near a store house about eleven o'clock at night: that two white men, strangers to him, came to the place where he and the prisoner were lying: that one of them, who, he has since learned, was Mr. Brickhouse, said they were patrollers, and Brickhouse took a piece of board and gave the witness and the prisoner each two or three slight blows, which did not hurt the witness, and the witness thought it was done in sport by Brickhouse. Brickhouse then asked the witness, if he could not get some girls for them, and further remarked, that he had money a plenty; witness declined doing so: about that time, Charles came up: Brickhouse asked Charles, if he knew they were patrollers, and took hold of Charles and ordered witness to go and get a whip to whip Charles with: witness moved off a few steps and stopped: Brickhouse then let go Charles and took hold of witness and the deceased also took hold of the hand of witness: Brickhouse then began to beat the witness with his fist and struck several blows on the head and in the side of witness, which hurt him, and he begged Brickhouse to quit. Witness further stated, that while Brickhouse was beating him with his fist and the deceased holding his hand, the prisoner went to the fence and got a rail, and struck in among them, and they all came down together, and he got up and ran off.

Charles was next examined by the State. Charles stated, that he heard a conversation and went to the place, where he found two white men and Cæsar and Dick, engaged in conversation: Brickhouse asked him (the witness,) if he knew they were patrollers and took hold of him (the witness,) and told Dick to go and get a whip: Dick moved off a few steps and stopped: Brickhouse let witness go and took hold of Dick and began to beat him with his fist, and the deceased also took hold of Dick:

the prisoner remarked to witness, that he could not stand that, and run to the fence and got a rail, and with the rail in both hands struck Brickhouse on the head: the rail broke in two pieces, leaving a piece of the rail three or four feet long in the hands of the prisoner: the prisoner then struck Mizell, the deceased, with the piece in his hands and felled him to the ground at full length: the prisoner then ran off and Brickhouse pursued him; witness also ran off, leaving the deceased lying at full length on the ground. This witness was then examined as to the size and quality of the rail, used by the prisoner. He stated, that it was a fence rail of the usual length, was fit for fencing, and was part of a fence, when taken by the prisoner, and was about the size of a piece of timber in the Court House, pointed out by the witness; which piece of timber was about four inches wide by two and a half inches thick. The witness further stated, that the rail aforesaid was of sap timber and tolerably rotten; and that it had rained the day before.

Whitmell, a slave, was next examined by the State. He stated, that on the night of the homicide the prisoner came to his house in Jameston, and asked him (the witness) how he was. Witness replied, he was very well. Witness then asked the prisoner how he was. The prisoner replied, bad enough, and went on to say, that he had knocked down one white man and crippled another; and further said, the white men were beating Dick: that he took a rail and knocked them down, one for dead; that the other white man called the one he had knocked down, but he did not answer, and he (the prisoner) did not know whether he was dead or not; the prisoner further stated, that the white men gave them two or three licks round and walked off, and he (the prisoner) and Dick laughed: the white men came back and fell to beating Dick—that he (the prisoner) asked Charles if he could stand that—Charles said nothing—prisoner said to Charles

with an oath, that he could not stand it—he got a rail and struck them, and left one of them for dead. The prisoner was a man of ordinary size; and it was in proof, that he was employed in getting timber. It was also in proof, that he was obedient to white persons, so far as the witness knew or had heard.

The Attorney General insisted, that, upon this evidence, it was a case of murder.

The prisoner's counsel contended, that whilst an ordinary assault and battery by a white man on a slave would not be sufficient to extenuate the crime from murder to manslaughter; yet this was a case, in which we were obliged to resort to the primary rule, which pronounces on the character of provocations, and that the application of this principle was left to the intelligence and conscience of the jury: That the circumstances of this case, the time, the manner, the drunken situation of the white men, their conduct on that occasion, being utter strangers to the negroes and the negroes to them, were naturally calculated to provoke a well disposed slave into a violent passion, and, therefore, the crime was extenuated to manslaughter.

The prisoner's counsel further contended, that, if the jury believed the deceased and Brickhouse having whipped the prisoner, then violently assaulted Dick, without provocation or justifiation, and was in the act of severely beating him (Dick begging) so as naturally to provoke the anger of the prisoner, being a well disposed negro, and, under the excitement of passion thus produced, the prisoner gave the deceased a blow, which produced death, it was only manslaughter: That, if the jury believed the deceased and Brickhouse, without authority or justification, having whipped the prisoner, then were in the act of severely beating Dick, the comrade of the prisoner, (Dick then begging,) and the prisoner, with the intent of releasing Dick from further violence, struck the deceased,

it was only man-slaughter: That, if the jury believed the deceased and Brickhouse, without authority or justification, whipped the prisoner, as stated by the witness, and then the deceased and Brickhouse, without authority, provocation, or justification, were violently beating Dick, the comrade of the prisoner, (Dick then begging) and the prisoner, under the excitement of passion thus produced and with an intent only to relieve his comrade, Dick, from further violence, struck the deceased, it was only manslaughter: That if the jury believed the prisoner struck with the intent only of preventing a felony upon Dick by Brickhouse and the deceased, it was only manslaughter: That, if the jury believed the prisoner struck, while smarting under the influence of passion, caused by the infliction of blows given him by Brickhouse or Mizell, under the circumstances it was only manslaughter. The prisoner's counsel further contended, that from the evidence in this case, the weapon used was not a deadly one; and that the jury were to decide that question, and argued to the jury, that at least it was doubtful, whether the weapon was deadly or not.

The Court charged the jury, that, if the evidence, submitted to them, satisfied their minds beyond a reasonable doubt, that the prisoner at the bar slew the deceased with a fence rail or a part of a fence rail, under the circumstances detailed by the witnesses, it was a case of murder.

If the witnesses had given a correct description of the rail or piece of rail, with which the prisoner inflicted the blow on the deceased, it was an instrument in the hands of a stout man calculated to produce death or great bodily harm; and was, therefore, in law, a deadly weapon. The Court further charged the jury, that, if the evidence of the witnesses Dick and Charles were true, as to what took place preceding the blow inflicted by the prisoner on the deceased, it would not amount to legal provocation, so as to extenuate the killing from murder to man-

slaughter—the prisoner being a slave and the deceased a free white man. The blows inflicted by Brickhouse on the prisoner, as detailed by the witness Dick, and the blows subsequently inflicted on Dick by Brickhouse, were, taking the evidence to be true, nothing more than ordinary assaults and batteries; and an ordinary assault and battery, inflicted by a free white man on a slave, would not amount to such legal provocation as would extenuate the killing of a free white man by the slave from murder to manslaughter, however worthless and degraded the white man might be.

The jury, under the charge of the Court, found the prisoner guilty, in manner and form, as charged in the bill of indictment. After sentence of death, the prisoner appealed to the Supreme Court.

Attorney General, for the State.
Biggs, for the defendant.

Pearson, J. The prisoner, a slave, is convicted of murder in killing a *white man*. The case presents the question, whether the rules of law, by which manslaughter is distinguished from murder, as between white men, are applicable, when the party killing is a slave. If not, then to what extent a difference is to be made?

The general question is now presented directly, for the first time. In "*Will's*" case, the person killed was the overseer, who stood in the relation of master. In "*Jarrott's*" case, the general question was discussed, but the decision did not turn upon it.

These being the only two cases in this Court, where it was necessary to discuss the question, while it renders our duty the more difficult, cannot fail to strike every mind, as a convincing proof of the due subordination and good conduct of our slave population, and to suggest, that,

if any departure from the known and ordinary rules of the law of homicide is to be made, it is called for to a very limited extent.

It is clear, that the killing of the deceased is neither a greater nor less offence, than would have been the killing of the witness, Brickhouse. He was the most forward and officious actor, but the deceased had identified himself with him. They set out upon a common purpose. When a false word was told, in saying, "they were patrollers," the deceased acquiesced by silence—when the slight blows were given with the board, the deceased gave countenance to it—when Brickhouse seized Dick and began to beat him, the deceased caught hold of his hands and held him, while his coadjutor beat him.

To present the general question by itself, and prevent confusion, it will be well to ascertain, what would have been the offence, if all the parties had been white men? Two friends are quietly talking together at night—two strangers come up—one strikes each of the friends several blows with a board; the blows are slight, but calculated to irritate—a third friend comes up—one of the strangers seizes him, and orders one of the former to go and get a whip that he might whip him. Upon his refusing thus to become an aider in their unlawful act, the two strangers set upon him—one holds his hands, while the other beats him with his fist upon the head and breast, he not venturing to make resistanee and begging for mercy—his friend yielding to a burst of generous indignation, exclaims, "I can't stand this," takes up a fence rail, knocks one down, and then knocks the other down, and without a *repetition of the blow*, the three friends make their escape. The blow given to one proves fatal. Is not the bare statement sufficient? Does it require argument, or a reference to adjudged cases to show, that this is not a case of *murder?* or, "of a black," diabolical heart, regard-

less of social duty and fatally bent on mischief? It is clearly a case of manslaughter in its most mitigated form. The provocation was grievous. The blow was inflicted with the first thing that could be laid hold of: it was *not repeated* and must be attributed, *not to malice*, but to a generous impulse, excited by witnessing injury done to a friend. The adjudged cases fully sustain this conclusion. In 12 *Coke. Rep.* 87, "two are playing at bowls; they quarrel and engage in a fight: a friend of one, standing by, seizes a bowl and strikes a blow, whereof the man dies. This is manslaughter, because of the *passion*, which is excited, when one *sees his friend assaulted.*" This is the leading case; it is referred to and approved by all the subsequent authorities. *King* v. *Huygot*, 1 Kel. 59. 1 *Russ. on crimes*, 500. 1 *East. P. C.* 328, 340.

As this would have been a case of manslaughter, if the parties had been white men; are the same rules applicable, the party killing being a slave? The law-making power has not expressed its will, but has left the law to be declared by the "Courts, as it may be deduced from the primary principles of the doctrine of homicide." The task is no easy one, yet it is the duty of the Court to ascertain and declare what the law is.

I think the same rules are not applicable; for, from the nature of the institution of slavery, a provocation, which, given by one white man to another, would excite the passions, and "dethrone reason for a time," would not and ought not to produce this effect, when given by a white man to a slave. Hence, although, if a white man, receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be *murder*; for, accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to "dethrone reason," and must be ascribed to a "wicked heart, regardless of social duty."

That such is the law is not only to be deduced, as above, from primary principles, but is a necessary consequence of the doctrine laid down in *Tucket's case*, 1 Hawks. 217. "Words of reproach, used by a slave to a white man, may amount to a legal provocation, and extenuate a killing from murder to manslaughter."

The reason of this decision is, that, from our habits of association and modes of feeling, insolent words from a slave are as apt to provoke passion, as blows from a white man. The same reasoning, by which it is held, that the ordinary rules are not applicable to the case of a white man, who kills a slave, leads to the conclusion, that they are not applicable to the case of a slave, who kills a white man.

The announcement of this proposition, now directly made for the first time, may have somewhat the appearance of a law, *made after the fact*. It is, however, not a *new law*, but merely a new application of a well settled principle of the common law. The analogy holds in the other relations of life—parent and child, tutor and pupil, master and apprentice, master and slave. A blow, given to the child, pupil, apprentice, or slave, is less apt to excite passion, than when the parties are two white men "free and equal;" hence, a blow, given to persons, filling these relations, is not, under ordinary circumstances, a legal provocation. So, a blow, given by a white man to a slave, is not, under ordinary circumstances, a legal provocation, because it is less apt to excite passion, than between equals. The analogy fails only in this: in the cases above put, the law *allows* of the *infliction of blows*. A master is *not indictable* for a battery upon his slave; a parent, tutor, master of an apprentice, is *not* indictable, except there be an excess of force; whereas the law *does not allow a white man to inflict* blows upon a slave, who is *not his property*—he is liable to indictment for so doing. In other words, in this last case, the blow *is not*

a legal provocation, although the party, giving it, *is liable* to indictment; while in the other cases, whenever the blow subjects one party to an indictment, it is a legal provocation for the other party. This is a departure from the legal analogy, to the prejudice of the slave. It is supposed, a regard to due subordination makes it necessary, but the application of the *new principle*, by which this departure is justified, should, I think, be made with great caution, because it adds to the list of constructive murders, or murders by "malice implied."

Assuming that there is a difference, to what extent is the difference to be carried? In prosecuting this enquiry, it should be borne in mind, that the reason of the difference is, that a blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain, and a sense of injustice; all, or either of which are calculated to excite passion: whereas, a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain and a sense of wrong; for, in the language of Chief Justice TAYLOR, in *Hale's case*, 2 Hawks, 582, "the instinct of a slave may be, and generally is, turned into subserviency to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission, for, he knows the extent of the dominion assumed over him, and the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights, and prompt the slave to resistance."

We have seen, that the general rule is, that whenever force is used upon the person of another, under circumstances amounting to an indictable offence, such force is a legal provocation; otherwise, it is not.

By this rule, "*Will's case*," 1 Dev. & Bat. 121, would have been a case of murder; for, it was settled in "*Man's case*," 2 Dev. 263, that a master is not indictable for a

battery upon his own slave, however severe or unreasonable. But *Will* was held guilty of manslaughter only, the Court feeling itself constrained to make some allowance for the feelings of nature. By this rule, if a slave, who has been guilty of insolence, receives a blow from a white man, it is a legal provocation; for the white man has committed an indictable offence. *Hale's case*, 2 Hawks. 582. This case would be as strong an authority to show, that the case above put was but manslaughter, except for reasons of policy and the necessity of keeping up due subordination, as "*Man's*" case was to show, that "*Will's*" case was a case of murder, except for an allowance for the feelings of nature.

In the case above put, a blow is supposed, unaccompanied by bodily pain or unusual circumstances of oppression, the only incentive to passion being a sense of degradation, which a slave is not allowed to feel. When bodily pain or unusual circumstances of oppression occur, one or both is sufficient to account for passion, putting a sense of degradation out of the question, and there would be legal provocation.

I think it clearly deducible from *Hale's case*, and analogies of the common law, that, if a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow, or repeated blows under unusual circumstances, and the slave *at the instant* strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination.

This latter consideration, perhaps, requires the killing should be *at the instant*; for, it may not be consistent with due subordination to allow a slave, after he is extricated from his difficulty and is no longer receiving blows or in danger, to return and seek a combat. A wild beast wounded or in danger will turn upon a man, but he sel-

dom so far forgets his sense of inferiority as to seek a combat. Upon this principle, which man has in common with the beast, a slave may, without losing sight of his inferiority, strike a white man, when in danger or suffering wrong; but he will not seek a combat after he is extricated.

If the witness, Dick, while one white man was holding his hands, and the other was beating him, had killed either of them, there would have been no difficulty in making the application of the above principles, and deciding, that the killing was but manslaughter, and of a mitigated grade, contrasted with *Will's case*, who, although he did not seek the combat, but was trying to escape, killed his *owner* with a knife, after being guilty of wilful disobedience; and the conclusion would derive comfirmation from the reasoning of Judge GASTON, in *Jarrott's case*, where the prisoner had it in his power to avoid the combat, if he would, and struck *several blows, after the white man was prostrated.*

In making the application of the principles before stated to the case of the prisoner, another principle is involved. The prisoner was not engaged in the fight—he was the associate and friend of Dick, and was present and a witness to his wrongs and suffering.

We have seen, that had he been a white man, his offence would have been but manslaughter; "because of the *passion*, which is *excited*, when one sees his friend assaulted." (See the case cited from *Coke's Rep'ts* and the other authorities.) But he is a slave, and the question is, does that benignant principle of the law, by which allowance is made for the infirmity of our nature, prompting a parent, brother, kinsman, friend, or even a stranger to interfere in a fight and kill, and by which it is held, that, under such circumstances, the killing is ascribed to *passion* and not to *malice*, and is manslaughter, not *murder*; does this principle apply to a slave? or is he com-

manded, under *pain of death*, not to yield to these feelings and impulses of human nature, under any circumstances? I think the principle does apply, and am not willing, by excluding it from the case of slaves, to extend the doctrine of constructive murder beyond the limits, now given to it by well settled principles. The application of this principle will, of course, be restrained and qualified to the same extent and for the same reasons, as the application of the principle of legal provocation, before explained. A slight blow will not extenuate; but, if a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow, or repeated blows under unusual circumstances, and another, yielding to the impulse, natural to the relations above referred to, strikes at the instant and kills, without evincing, by the means used, great wickedness or cruelty, the offence is extenuated to manslaughter.

In 1 *East. P. C.* 292, and in 1 *Russel on crimes*, 502, it is said, "after all, the nearer or more remote connection of the parties with each other, seems more a matter of observation to the jury, as to the probable force of the provocation, and the motive, which induced the interference of a third person, than as furnishing any precise rule of law, grounded on such a distinction."

The prisoner was the associate or friend of Dick—his general character was shown to be that of an obedient slave, submissive to white men—he had himself received several slight blows, without offence on his part, to which he quietly submitted—he was present from the beginning—saw the wanton injury and suffering inflicted upon his helpless, unoffending and unresisting associate—he must either run away and leave him at the mercy of two drunken ruffians, to suffer, he knew not how much, from their fury and disappointed lust—the hour of the night forbade the hope of aid from white men—or he must yield to a generous impulse and come to the rescue. He used force

enough to release his associate and they made their escape, without a *repetition* of the *blow* Does this show he has the heart of a murderer? On the contrary, are we not forced, in spite of stern policy, to admire, even in a slave, the generosity, which incurs danger to save a friend? The law requires a slave to tame down his feelings to suit his lowly condition, but it would be savage, to allow him, under no circumstances, to yield to a generous impulse.

I think his Honor erred in charging the jury, that, under the circumstances, the prisoner was guilty of murder, and that there was no legal provocation. For this error the prisoner is entitled to a new trial. He cannot, in my opinion, be convicted of murder, without overruling *Hale's case* and *Will's case*. It should be borne in mind, that in laying down rules upon this subject, they must apply to white men as a class, and not as individuals; must be suited to the most *degraded*, as well as the most orderly. Hence great caution is required to protect slave property from wanton outrages, while, at the same time, due subordination is preserved.

It should also be borne in mind, that a conviction of manslaughter is far from being an acquittal; it extenuates on account of human infirmity, but does not justify or excuse. Manslaughter is felony. For the second offence life is forfeited.

I think there ought to be a new trial.

NASH, J. I concur with Judge PEARSON in the opinion, that the prisoner is entitled to have his cause reheard before another jury. The presiding Judge erred in instructing the jury, that the assault and battery, committed by the deceased and the witness Brickhouse upon the prisoner and his associate Dick, was an ordinary assault, and did not extenuate the homicide. The time, a late hour in the night, when all appeal to the interference of

white men was cut off—the manner, two drunken men, strangers to the prisoner, with their passions inflamed by lust and spirits—all show, that it was not an ordinary assault and battery. It is not simply the force and instrument, that are actually used, which give to an assault its true character, but that character is derived in a great measure from the attending circumstances. Thus, the touching of the person of a female in an indecent manner is considered as an aggravated offence—so a fillip on the nose. In each of these cases, no force but that of a legal character is used. And yet the perpetrator has so far lost the protection of the law, that, if slain immediately, the homicide is not murder, though a deadly weapon be used. His Honor, therefore, in my opinion, erred in telling the jury that the assault was an ordinary one. If he meant, that no instrument or weapon of a dangerous character was used by the deceased and the witness Brickhouse, it was a fact that did not, necessarily, enter into the grade of the offence committed by them, and his language was well calculated to mislead the jury—to lead them to the conclusion, that no assault upon a slave by a white man can be an aggravated one, or calculated to produce that *furor brevis*, which dethrones reason for the time being, and repels the idea of malice in the slayer, except when a deadly or dangerous weapon is used. If such an effect could be produced on the minds of the jury, and cases can be shown, in which the slaying of a white man by a slave will be extenuated from murder to manslaughter, where the assault and battery is an aggravated one, then there must be error in the charge, in point of law, and the prisoner is entitled to the benefit of the objection.

Suppose a parcel of drunken white men, say a dozen, meet a slave in the highway, in a lonely spot, and seize him, and while some hold him, others of the party proceed to beat him, and in his terror and pain, he kills one

of them with a deadly weapon, could it be pretended the slayer would be guilty of murder? It is said, the law does not allow a slave to feel the degradation of a blow, when inflicted by a white man, to the point of dethroning reason; does the law equally deny him the privilege of pleading the dethronement of reason from the passion of fear and apprehension? If this be so, then there was error in the charge. His Honor ought to have instructed the jury, that an assault made by a white man upon a slave, which endangers his life or *threatens great bodily harm*, will amount to a legal provocation. *State* v. *Jarrott*, 1 Ire. Rep. 86. *State* v. *Will*, 1 Dev. & Bat. 163. The prisoner was entitled to have the law, bearing upon the case, fully and correctly laid down by the Court. This, in my judgment, has not been done in the matter now discussed; and as the verdict must have been affected by that error, the prisoner is entitled to a new trial.

But there is another and a graver question to be considered. At the time the prisoner struck the fatal blow, he was in no immediate danger of farther violence by the deceased and the witness Brickhouse. The witness Dick was, at the time of the killing, the sufferer—the blows were then being inflicted on him. If he had committed the homicide while being beaten, in my opinion, his crime would have been manslaughter—is the killing by Cæsar entitled to the same consideration? There is not the slightest evidence of any express malice—will the law, under the circumstances of this case, imply malice? Most certainly to my mind it will not. I have, in my preceding remarks, treated the case as if the blows, inflicted on Dick, at the time the fatal blow was given, had been inflicted on the prisoner. I have so done, because, if the prisoner were a white man, there is no doubt, at common law, his offence would have been manslaughter, and not murder. Upon this point, the opinion of my brother PEARSON is clear and conclusive. Does the fact, that the prisoner

and his associate Dick are slaves, alter the law? *This* point has not heretofore been decided by this Court. By the common law, the prisoner's offence would clearly be mitigated to manslaughter—by what legislative act, I mean by what act of the legislative power of this country, has that rule been altered as to slaves? Has this Court power to legislate, to *establish* "a rule of action," by which the citizens of the country shall govern themselves? Is it not a legislative act to dispense with a rule of the common law, which, in mercy to human frailty, has been adopted to save life? But I am called on, not only to abrogate one rule, but, necessarily, to introduce another. If you say, the prisoner is not entitled to the rule of the common law, which knows no difference of caste, then you not only strip him of a defence, which the common law secured to him, but you establish another rule, that a slave shall, in no case, strike a white man for an assault and battery upon another slave, no matter in what relation he stands to him, or what the force used by the white man, or what the nature of the weapon used by him. I ask for the authority so to declare. I am referred to the degraded state of slaves; that what would rouse to phrensy a white man, he is brought up from infancy to bow to. I am told, that policy and necessity require that a different rule should exist in the case of a slave. Necessity is the tyrant's plea, and policy never yet stript, successfully, the bandage from the eyes of Justice. It does not belong to the bench, but to the halls of legislation. I fully admit, that the degraded state of our slaves requires laws different from those applicable to white men, but I see no authority in the Courts of justice, to make the alteration. The evil is not one, which calls upon the Court to abandon their appropriate duty, that of enforcing the law as they find it. The Legislature, and only the Legislature, can alter the law. It is not likely, however, that they will undertake the task, diffi-

cult as it is admitted to be, while they find the Courts of justice willing to take from them the responsibility of providing for the evil. There are several cases decided by this Court, upon the subject of homicide, committed by white men on slaves, and by slaves on white men. It is not my purpose, nor would it become me to sit in judgment, on this occasion, upon their correctness—they were made by able men and profound lawyers—by good men, who could not be seduced from what they considered the path of duty; and when a case shall come before me, which is governed by them, I may find it my duty to conform to them. This is a new case, and I feel, not only justified, but commanded to adhere to the common law. It sheds a steady light upon the path of the jurist, and gives him a safe and fixed rule to govern himself by. In all the cases, to which my attention has been drawn, the Judges admit the difficulty of laying down any general rule different from that of the common law. The language of Chief Justice TAYLOR in *Hale's case*, is, "it is impossible to draw the line (speaking of what will constitute a legal provocation for a battery committed by a white man on a slave) with precision, or lay down the rule in the abstract, but, as was said in *Tackett's case*, the *circumstances* must be judged of by the Court and jury, *with a due regard to the habits and feelings of society.*" And the late Judge GASTON, than whom an abler Judge or better man never sat upon the seat of Justice, in *Jarrott's case*, after admitting, that no precise rule had been laid down, by which to pronounce what interference of a white man, not the owner, shall be deemed a sufficient legal provocation, and remarking upon the difficulty of so doing, winds up by saying, "that is a legal provocation, of which it can be pronounced, having a due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passion to his condition of inferiority, that it

would provoke well disposed slaves into a violent passion. And the application of the rule must be left, until a more precise rule can be formed, to the *intelligence* and *conscience* of the *triers*." The same profound Judge, in *Will's case*, furnishes me with a rule for my judgment in this case, of which I gladly avail myself. Will was indicted for the murder of his overseer. His language is, "in the absence then of all precedents directly in point, or strictly analogous, the question recurs: if the passions of the slave be excited into unlawful violence, by the inhumanity of his master or temporary owner, or one clothed with the master's authority, is it a *conclusion of law*, that such passions must spring from diabolical malice? *Unless I see my way clear as a sunbeam*, I cannot believe that this is the law." Not only do I not see my way clear as a sunbeam, but my path, the moment I desert the well known principles of the common law, is obscured by doubts and uncertainties. I look in vain to those, who have preceded me, for a safe guide. The common law tells me, that, although the passion excited in the mind of the prisoner, by witnessing the cruelty inflicted on his associate and companion, did not justify his killing, yet, springing as it did from the ordinary frailty of human nature, rebuts the idea of malice, and extenuates it to manslaughter. Why should I desert this safe guide, to wander in the mazes of judicial discretion, and that too, in a case of life and death; and which has been correctly designated by this Court, in a recent case, as the worst and most dangerous of tyranies. The conclusion, to which I have been brought is, that this prisoner is entitled to a new trial for the error in the charge, as to the nature of the assault and battery committed by the white man. If I were called on to lay down a rule, by which a homicide committed by a slave on a white man in consequence of an assault and battery upon him, should be mitigated to manslaughter, and were at liberty to do so, I should adopt

the one stated by Judge PEARSON in this case, as being safer and more distinct than any one yet suggested. Still in the language of Judge GASTON, in *Jarrott's case*, "the application of the principle must be left, until a more precise rule can be formed, *to the intelligence and conscience of the triers.*"

In my opinion, the judgment must be reversed and a *venire de novo* awarded.

RUFFIN, C. J. I am unable to concur in the judgment of the Court, and, upon a point of such general consequence, I conceive it to be a duty to state my dissent, and the grounds of it.

There are circumstances in the case which might be worthy of consideration, as being unlawful acts on the part of the slaves, prior to the violence on either side. They were from home without passes from their owners, and associated in the street of a village in the middle of the night. They were, thus, subject to be taken up by any one, and might be looked on as the first transgressors. But all observations upon those facts may properly be pretermitted; because, upon the supposition, that Brickhourse and Mizell were wrong-doers throughout, it appears to me, that upon adjudged cases and principles, their acts, as far as they had gone, did not amount to a legal provocation; such as ought, or would ordinarily, rouse the angry passion in negro slaves and carry them to such a pitch as to dethrone reason, and, under a sense of outrage and forgetfulness of their vast inferiority, prompt them, through the infirmity of nature, to slay a white man for the trespass.

It is very clear, that the question turns on the difference in the condition of the free white men and negro slaves. For, there is no doubt, if all the persons had been white men, that the conduct of the deceased would have palliated the killing by the person assaulted, or by his comrade, to manslaughter. It may also be assumed, that

if all the parties had been slaves, the homicide would have been of the same degree. But it has been repeatedly declared by the highest judicial authorities, and it is felt by every person, lay as well as legal, that the rule for determining what is a mitigating provocation cannot, in the nature of things, be the same between persons who are in *equali jure*, as two freemen, and those who stand in the very great disparity of free whites and black slaves. Thus in *Hale's case*, 2 Hawks, 582, the point was, whether a battery by a white man on the slave of another was indictable, and the language of the Court was, "that, as there was no positive law decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result, which is best adapted to general expedience." Hence the Court held, that such a battery was a breach of the peace and as such indictable: but explicitly declared further, "that, at the same time, it is undeniable, that such offence must be considered with a view to the actual condition of society, and the difference between a white man and a slave, securing the first from injury or insult, and the other from needless violence and outrage; and that from that difference it arises, that many circumstances, which would not constitute a legal provocation for a battery by one white man on another, would justify it, if committed on a slave, provided it were not excessive." The learned Chief Justice TAYLOR would not pretend to frame a precise rule in the abstract, to be applied to every case, but added a reference to his own language in *Tackett's case*, 1 Hawks 210, "that the circumstances are to be judged of with a due regard to the habits and feelings of society." In *Tackett's case*, although the statute of 1817 enacted, that the killing of a slave should partake of the same degree of guilt, when accompanied with the like

circumstances, that homicide then did, it was held by the Court, that the purpose was merely to make the manslaughter of a slave punishable in the same manner with that of a white person; and that the statute did not mean to declare that homicide, where a slave is killed, could only be extenuated by such a provocation as would have the same effect, where a white person was killed. The Chief Justice says: "the different degrees of homicide, they, (the Legislature,) left to be ascertained by the common Law—a system which adapts itself to the habits, institutions, and actual condition of the citizens, and which is not the result of the wisdom of any one man or society of men, in any one age, but of the wisdom and experience of many ages of wise and discreet men. It exists in the nature of things, that, where slavery prevails, the relation between a white man and a slave differs from that, which exists between free persons; and every individual in the community feels and understands, that the homicide of a slave may be extenuated by acts, which would not produce a legal provocation, if done by a white person. To define and limit those acts would be impossible; but the sense and feeling of jurors and the grave discretion of Courts cannot be at a loss in estimating their force and applying them to each case, with a due regard to the rights respectively belonging to the slave and white man—to the just claims of humanity, and the supreme law, the safety of the citizens." The rules thus laid down, though not professing to assume the form of definitions, and to suffice, in themselves, for the determination of every case, are rendered intelligible and material aids upon the point before us by the example, which the Chief Justice adduces to illustrate his meaning. "It is," says he, "a rule of law, that neither words of reproach, insulting gestures, nor a trespass on goods or lands, are provocations sufficient to free the party killing from the guilt of murder, where he used a deadly weapon.

But it cannot be laid down, that some of those provocations, if offered by a slave, would not extenuate the killing, if it were instantly done, under the heat of passion, and without circumstances of cruelty." The soundness of the reasoning, on which the Court proceeded in those cases, and of the principles established by it, must be acknowledged, I think, by every candid mind. The dissimilarity in the condition of slaves from any thing known at the common law cannot be denied; and, therefore, as it appears to me, the rules upon this, as upon all other kinds of intercourse between white men and slaves, must vary from those applied by the common law, between persons so essentially differing in their relations, education, rights, principles of action, habits, and motives for resentment. Judges cannot, indeed, be too sensible of the difficulty and delicacy of the task of adjusting the rules of law to new subjects; and therefore they should be and are proportionally cautious against rash expositions, not suited to the actual state of things, and not calculated to promote the security of persons, the stability of national institutions, and the common welfare. It was but an instance of the practical wisdom, which is characteristic of the common law and its judicial ministers as a body, that the Courts should, in those cases, have shown themselves so explicit in stating the general principle, on which the rules of law on this subject must ultimately be placed, and yet so guarded in respect to the rules themselves in detail. Yet it is of the utmost importance, nay, of the most pressing necessity, that there should be rules, which, as rules of law, should be known; so that all persons, of whatever race or condition, may understand their rights and responsibilities in respect to acts, by which blood is shed and life taken, and for which the slayer may be called to answer at the peril of his own life. Whenever, then, the highest judicial tribunal of the country gravely declares its opinion upon a point applicable to a subject thus novel

and difficult, great respect is due to it from succeeding Judges. And when a case is brought directly into judgment before such a tribunal, and, in its decision, certain principles are, after full deliberation, solemnly announced and acted on, the judgment ought to be regarded as settling the point decided. If upon any question, it is upon one like this, that a well considered precedent is of utility and binding force. The certainty of the law, in respect to all matters of high importance, requires, especially upon a question of this kind, that the Court should adhere to what is once resolved: more particularly, when the resolution is of some years standing, and the sanction of the legislature may be implied, from the omission of that body, the source of the law, to abrogate or modify it. And when an intelligible principle is explicitly laid down in an adjudication, or necessarily results from it, every consideration of judicial prudence, of the security of the citizen, and of that quiet of mind, which a known law inspires in contradistinction to unknown and uncertain opinions, which successive Judges may individually entertain, should impart to such principle the authority of law. It is under such impressions, that I am led to the opinion, that the prisoner is guilty of murder. It results almost necessarily, as it seems to me, from the doctrine of *Tackett's and Hale's cases*, as already quoted. But I consider that, in pursuance of the reasons and rules of those cases, it was expressly decided and the rule laid down in *Jarrott's case*, 1 Ired. 76, nearly in the very language, in which the instructions were given to the jury in this case. After stating that no precise rule had been before laid down, as to the unlawful interference with the person of a slave by a white man, which should be deemed a legal provocation, extenuating the killing of the assailant to manslaughter, and after acknowledging it to be no easy task to prescribe one for all cases, consistent at once with the policy and the humanity of the law, the Court explicitly

declared, that the law "clearly forbids, that an ordinary assault and battery should be deemed, as it is between white men, a legal provocation." To my apprehension, that is directly applicable to the case before the Court and decisive of it. The proposition is conceived with clearness and expressed with precision; and as far as it goes, it affords a safe footing upon firm ground gained in a morass. Why abandon it, not knowing on what we are next to tread? It is said, indeed, that the principle laid down is not obligatory, because the adjudication in the case was not in conformity to it, inasmuch as a *venire de novo* was awarded. Certainly, it was not considered at the time to be an extra judicial dictum of the Judge, who delivered the opinion; but the point was deliberately discussed and the conclusion clearly concurred in by every member of the Court. Indeed, whoever will take the pains to examine the case carefully, will find it to be a mistaken supposition, that the point was not in judgment there. The opinion given may be erroneous; but undoubtedly it was not an unadvised nor an extrajudicial determination. For it will be noticed, that there were four exceptions taken for the prisoner, each one of which it was alike the duty of the Court to consider; and that, in reference to one of them, the position under consideration was relevant, and as such was laid down. The judgment was indeed reversed; but it was because the Judge refused to instruct the jury, upon the prisoner's prayer, that, for the insolent language given by the prisoner, the deceased had no right to assault him with a sharp knife and a fence rail, as the deceased repeatedly did. That refusal was the ground of one of the exceptions; and the Court held, that although insult in words or manner, from a slave to a white person, may excuse or justify a moderate battery, yet it would not authorise one that was excessive or one with the dangerous weapons, which the deceased attempted to use. For such an

assault, the party assailed, though a slave, might, upon the instinct of self-preservation, or under the fury which so wanton an attempt upon his limb or life would excite, slay the assailant, without incurring the guilt of murder. But, upon the reversal of the judgment upon that exception, the prisoner was not discharged, but was sent back to another trial; and hence the Court was called on to dispose of the other exceptions, in order to meet the case as it was seen it must appear on the next trial. Hence the Court said, that, under a sense of duty they could not forbear examining the case on the other points, nor rightfully decline the declaration of "the decided judgment they had formed on them." This question of the provocation of a slave by a white man is not, then, directly presented in the present case for the first time. It was the subject of the three other exceptions in *Jarrott's case* in different forms, and it was discussed and the point decided by the Court in reference, expressly, to the effect the judgment was to have on that very man's life or death on his next trial. It was a decision demanded by the prisoner, and one which directly concerned the public justice to be administered to him, and which the Court was obliged to make. What was said on that occasion was, therefore, as little like an extrajudicial dictum as any thing that ever fell from a Court; and, as an authority, it is entitled to as much weight as any adjudication ever made by the Court. What, then, were the decisions on those exceptions? They were: first, that some matters, which would be sufficient, as provocations, to free a white man from the guilt of murder, would not be sufficient to have the same effect, when the party slain is a white man, and the slayer is a slave: Secondly, that the distinction arose from the vast difference in the social condition of the whites and the slaves, and was inherent in the castes and not dependent on the character or merits or demerits of different white men: And thirdly, and specifically, that a battery

by a white man, which endangers a slave's life or great bodily harm will amount to a legal provocation; but that clearly an ordinary assault and battery is not such a provocation. What an ordinary battery is, as meant by the Court, it cannot be difficult to ascertain. The signification would seem naturally to be pointed out, by its being used in immediate and direct contradistinction to a battery, endangering life or causing great bodily harm. The Court cannot be supposed to have an allusion to any act of indignity merely, such as giving a slave a fillip, or pulling his nose, in public; as that would be an absurd contradiction to the scope of all the reasoning on which the opinion rests, which was declared. An ordinary battery plainly means one, which is described in the books by the term "moderate" in contrast to that of "excessive," used likewise in the text books and in the passages quoted from the cases in this Court. There may be other instances, in which, from the severity of chastisement or its cruel protraction, the smart of pain, and the uncertainty of the extent of suffering, to which the unoffending negro may suppose an intention to subject him, may properly be allowed to be a provocation transporting the slave beyond the control of his reason and habitual subordination, and endurance of personal wrongs from the whites. To instances of that kind allusion is made in *Jarrott's case*, as being injuries of various grades between the two extremes before mentioned; and as to them the Court, without undertaking *a priori* to frame a precise rule, ventures only to advance the general doctrine, that an act is to be deemed a legal provocation, of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and to the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion. Without attempting to enumerate all the instances falling within those observations, or even to give further exam-

ples, it is sufficient, that I should say, as his Honor did, that there were here nothing more than ordinary batteries. If they be not of that character, it is difficult to conceive such as would fall within the description. At first some slight slaps with a light board were given, which were evidently in sport, or, if it be liked better, in wantonness, and certainly not to chastise or provoke the slaves—as the witness explicitly stated. that they did not hurt him, and the prisoner told another witness, that he laughed at them. It is true, that the blows afterwards given with the fist did hurt. But no wounds are described or serious injury mentioned—the witness saying only, that the first blows did not, and that the last did, hurt. The extent of the hurt must, then, be estimated from the conduct the blows produced in the man, on whom they were inflicted; and by those means it may be correctly estimated. Did they make his blood boil and transport him, so that, being wrought into a tempest of passion, he attempted in retaliation to slay his assailant, or even to join battle with him with their natural weapons? Far from it. On the contrary, he acted precisely as slaves ordinarily do under such circumstances—in that very manner, indeed, which proves, that the Courts have hitherto rightly judged, that slaves, not dangerously or excessively and cruelly beaten, will not so feel the degradation and outrage of a battery by a white man, as to be prompted instantly to seek redress at the expense of the other's life. He sought no assistance, but submitted without a struggle, and begged; and, when freed from forcible detention, he made no effort to be revenged, nor showed any resentment, but merely escaped quietly. How, then, can a Court by possibility hold, that such a battery is legally a provocation to kill, when, from the evidence of the man upon whom it was made, we see clearly, that in fact it was not, and produced in him no such impulse? As it appears to me, then, according to the rule of *Jarrott's* case, there was no such

battery by either Brickhouse or Mizell, as would have mitigated to manslaughter the killing of either by the person assailed.

If, however, that rule were not to be deemed law in virtue of an adjudication, its intrinsic correctness is sufficient to sustain it. As has been already stated, it is founded on the difference of condition of free white men and slaves, according to our institutions and habits. There is nothing analogous to it in the relations recognised by the common law. *Tackett's case*, and *Mann's* case, 2 Dev. 260. It involves a necessity, not only for the discipline on the part of the owner requisite to procure productive labor from them, but for enforcing a subordination to the white race, which alone is compatible with the contentment of the slaves with their destiny, the acknowledged superiority of the whites, and the public quiet and security. The whites forever feel and assert a superiority, and exact an humble submission from the slaves; and the latter, in all they say and do, not only profess, but plainly exhibit a corresponding deep and abiding sense of legal and personal inferiority Negroes—at least the great mass of them—born with deference to the white man, take the most contumelious language without answering again, and generally submit tamely to his buffets, though unlawful and unmerited. Such are the habits of the country. It is not now the question, whether these things are naturally right and proper to exist. They do exist actually, legally, and inveterately. Indeed, they are inseparable from the state of slavery; and are only to be deemed wrong upon the admission that slavery is fundamentally wrong. Now, they must necessarily modify the rules of law, regulating the relation of man to man, so as to render them applicable, without injustice, to the two classes and races of our people, and suit them to the exigencies arising out of their living together, with such different passions, prejudices,

pursuits, and privileges. How is that to be effected? In reference to the point in hand, it would seem that but one method could be devised or thought of; which is that, to which every Judge has resorted, who has been called to make up a judgment on it. It is to ascertain, from careful observation, the actual effect on the bulk of one race of certain conduct on the part of those belonging to the other. Indeed, that is, alone, the ground, on which the law classifies the different kinds of homicide. It is on that principle the law holds, that, when one free person is smitten by another and kills him on the sudden, it is not murder; because the act is not fairly and generally attributable to malignity of heart, but to that infirmity which is common to men in general in that condition; and, therefore it is fit, that there should be a compassionate consideration for it. That principle is as applicable to contests arising between the white and slave castes, as to the whites by themselves. The cases of children and apprentices, at the common law, do not rest upon an independent arbitrary rule, but are examples merely of the principle under consideration. It is found that, when fathers and mothers correct those under their tutelage, they are not ordinarily prone to resent by violent retaliation, much less to attempt to kill; but that, on the contrary, the young do the elder reverence. If, then, a child under punishment slays his parent, the conclusion is, that he was not moved to it by heat of blood on the sudden, but by a malignant and diabolical spirit of vengeance. That is the effect of applying that test of common experience between persons in those relations. What will be the effect of applying it by a calm observer between free whites and negro slaves? Why, as laid down in the cases of *Tackett* and *Mann*, in respect to a provocation from a slave to a white man, upon which death takes place, "every individual in the community feels and understands, that the homicide of a slave may be extenua-

ted by acts, which would not constitute a legal provocation, if done by a white person ;" and that "many circumstances, which would not constitute such a provocation for a battery by one white man upon another, would justify it, if committed on a slave." That, we see, is the result of an application of the principle of the common law to the homicide of a slave by a white man—of that fruit of "the wisdom and experience of many ages of wise and discreet men, adapted to the habits, institutions, and actual condition of our citizens." And I think a Judge in this country will find himself compelled to adhere to that rule, whenever he is called to consider, whether the offence of a white man, whom he is trying for killing a slave, is or is not extenuated by the abusive and insolent reproaches of the slave and his trespass on his property before his face. So, it follows, as certainly as day follows night, that many things, which drive a white man to madness, will not have the like effect, if done by a white man to a slave ; and, particularly, it is true, that slaves are not ordinarily moved to kill a white man for a common beating. For, it is an incontestable fact, that the great mass of slaves—nearly all of them—are the least turbulent of all men ; that, when sober, they never attack a white man ; and seldom, very seldom, exhibit any temper or sense of provocation at even gross and violent injuries from white men. They sometimes deliberately murder ; oftener at the instigation of others, than on their own motive. They sometimes kill each other in heat of blood, being sensible to the dishonor in their own caste of crouching in submission to one of themselves. That, however, is much less frequent than among whites ; for they have a duller sensibility to degradation. But hardly such a thing is known, as that a slave turns in retaliation on a white man, and, especially, that he attempts to take life for even a wanton battery, unless it be carried to such extremity as to render resistance proper in defence

of his own life. Crowds of negroes in public places are often dispersed with blows by white men, and no one remembers a homicide of a white man on such occasions. The inference is, that the generality of slaves—those who are well disposed towards the whites, as are almost all—do not in truth and fact find themselves impelled to a bloody vengeance, upon the provocation of blows with the fist or a switch from a white man. That is the experience of the whole country. In the course of nearly forty-two years of personal experience in the profession and a very extensive intercourse with other members of the profession from every part of the State, I have not known or heard of half a dozen instances of killing or attempting to kill a white man by a negro in a scuffle, although the batteries on them by whites have been without number, and often without cause or excessive Desperate runaways sometimes resist apprehension by a resort to deadly weapons. But the fact certainly is, negro slaves can hardly be said to be at all sensible to the provocation of an assault from a white man, as an incentive to spill blood. Such being the real state of things, it is a just conclusion of reason, when a slave kills a white man for a battery not likely to kill, maim, or do permanent injury, nor accompanied by unusual cruelty, that the act did not flow from generous and uncontrollable resentment, but from a bad heart—one, intent upon the assertion of an equality, social and personal, with the white, and bent on mortal mischief in support of the assertion. It is but the pretence of a provocation, not usually felt. Therefore, it cannot be tolerated in the law, though acted on in this particular instance by the prisoner—just as the law will not allow any provocation of words, gestures, or trespass on land or goods from one *in equali jure*—however grievous sometimes to be borne, and however they may have actually transported a particular individual—to extenuate a homicide, because, as it holds, a rational

being is not too infirm to withstand such acts of provocation. Therefore we concluded in *Jarrott's case*, as I would now hold, "that the law will not permit the slave to resist"—that is, in a case of an ordinary assault and battery on him—"but that it is his duty to submit, or flee, or seek the protection of his master:" as in almost every instance he would in fact do.

But it was further argued for the prisoner, that *Jarrott's* case is not in conformity with the previous cases of *Hale*, and of *Will*, 1 Dev. & Bat. 121, and that for that reason it cannot stand. But I must say, that it seems to me to be consistent with those two and all the other cases on this subject. I aided in the decision of most of them, and thought I understood them, and certainly I was not conscious of any conflict between them; nor am I yet. *Hale's* case decides that a battery on a slave by a stranger is indictable; and it decides nothing more. It was before my time; but I acknowledge its authority, and, indeed, heartily concur in it. But it proceeds further, upon a course of reasoning, to lay down a rule modifying that of the common law, as applicable to free equals, by saying—also correctly, as I think—that many things will excuse or justify a battery on a slave, that would not have the same operation in the case of a white person; and it refers to *Tackett's* case as containing, in the passages already quoted from it, the true doctrine of our law, as held by the Court, on this subject. All that, as far as it goes, is but what was said precisely in *Jarrott's* case. Neither *Hale's* case, nor *Tackett's* has a word, as to what redress a slave may take into his own hands for a battery on him by a white man. On the contrary, as was said in *Jarrott's* case, it clearly follows *e converso* from the decision and rule of *Tackett's* and the doctrine of *Hale's* case, that many things, which, between white persons, are greivous provocations, will not and cannot be so regarded, when proceeding from a white person to a slave, whose pas-

sions ought to be and are tamed down to his lowly condition. No one has thought, that there could not be a provocation from a white man to a slave, which would not extenuate a killing of the latter. It was, indeed, at one time held, that there could be no manslaughter of a slave by a white man, and that what would be only an extenuation of the killing of a white man by another, would excuse the killing of a slave by him. That, however, was altered by the Legislature; and the question, in relation to both kinds of homicide, has since been, what are legal provocations. With respect to the killing of a white man by a slave, we have thought those acts ought not to be recognised as provocations, which, according to common experience, do not, in the actual condition of these people among us, produce in them that *furor brevis* which the law mercifully regards; and that a moderate chastisement was of that character; but, on the other hand, that, as in *Will's* case, forcible injuries might be so wantonly and excessively inflicted on a slave, as to palliate his killing his opposer, though a white man. That case strikes me as having as little similitude to the present, as can exist between two cases of homicide in a sudden combat. There, in order to avoid threatened punishment, a negro man ran off from an overseer, who within a few steps brutally shot a whole load of his gun into his back, giving him a most dangerous and painful wound. The slave did not then turn on the assailant, but still endeavored to escape, and the deceased, with a party of slaves pursued and headed him, and, after the prisoner had gone as far as he could, he was overtaken—all within a short period of six or eight minutes—when the overseer seized him for further punishment, and commanded the negroes to lay hold, when the prisoner drew a knife and first struck at one of the negroes and then at the overseer and killed the latter. Upon those facts the Court held, there was a legal pro-

vocation; and there certainly was, if human nature has any terror of death, instinct of self-preservation, or any sense, mental or corporeal, of the pain and injury of an unlawful and atrocious attempt to take life. Those were real provocations to any man, even one in his condition. But is it to follow therefrom, that a slave, who for a stroke with a switch or a few blows with the fist, kills a white man with a deadly weapon, did so under provocation, which might reasonably and in fact did rouse him to a pitch of furious passion, which drove him to the deed? Far from it, in my opinion; and I fear that it is giving occasion unnecessarily to much bloodshed, when it is so held. My conclusion is, that, if the man Dick had killed either of the white men concerned in this unfortunate affair, it would have been murder. And I must express the hope, that it will thus be seen, that my opinion does not proceed upon a cold and rigorous policy of repressing in a slave an actual sense of the wrong done him by a wanton battery, in order more effectually to subjugate him; but that it rests on *the fact*, that a common battery from a white man—such as was in this case committed—does not ordinarily provoke a slave to go to the extremity of taking life.

All the foregoing reasons apply with yet more force against the prisoner; as he was not engaged in any way, but was a mere looker on. I believe, this is the very first instance in which a slave has ventured to interpose, either between white men, or between a white man and a slave, taking part against the white man. Why should he intermeddle upon the plea of resisting the unlawful power, or redressing the wanton wrong, of a white man, when he, to whom the wrong was done, is admitted to have been unresisting? Shall one slave be the arbiter of the quarrels witnessed by him between another slave and the whites? It seems to me to be dangerous to the last degree to hold the doctrine, that negro slaves may

assume to themselves the judgment as to the right or propriety of resistance, by one of his own race, to the authority taken over them by the whites, and, upon the notion of a generous sympathy with their oppressed fellow servants, may step forward to secure them from the hands of a white man, and much less to avenge their wrongs. First denying their general subordination to the whites, it may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely. The rule, which extenuates the assistance given by a white man to his friend, in a conflict between him and another white man—all being *in equali jure*—cannot, I think, be safely or fairly extended, so as to allow a slave, upon supposed generous impulses, to do the noble duty of killing a white man, because he tyrannizes over a negro man, so far as to give him a rap with a ratan and a few blows with his fists. I have never heard such a position advanced before, either as a doctrine of our law or as an opinion of any portion of our people.

For these reasons, the judgment, I think, ought to be affirmed.

Per Curiam. Ordered that the opinion of the majority of the Court be certified to the Superior Court of Law of Martin County, that it may proceed accordingly.

THE STATE *vs.* ROBERT HILDRETH.

In an indictment for homicide, it is the province and duty of the Court to inform the jury, upon the supposition of the truth of the facts, as being agreed on or found by the jury, what the degree of the homicide is.

Where the State, in a prosecution for a homicide, relies upon the ground of express malice, the witnesses can only prove the existence of previous malice or threats, but they cannot prove the existence of the malice up to the time of the homicide and that the prisoner acted on it in slaying. It is the province of the jury to make those inferences, or not, upon the facts proved.

When persons fight on fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only; but, if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder.

It is the province of the Court, in which the trial takes place, to judge of the truth or sufficiencey of the causes assigned for a motion for a continuance or removal of a trial.

Appeal from the Superior Court of Law of Richmond County, at the Fall Term 1848, his Honor Judge CALDWELL presiding.

The prisoner was indicted in Anson for the murder of William Taylor; and David Hildreth was charged in the same indictment, as being present, aiding and abetting. At the instance of the prisoner, his trial was removed to Richmond; and in Richmond the prisoner prayed for a second removal of the trial, upon his affidavit, which is set out in the bill of exceptions, stating various acts of sundry persons and other circumstances, which had induced him to believe, that he could not have a fair trial in Richmond. The Court refused the motion. The prisoner then moved for a continuance, upon his affidavit, which is also set out in the bill of exceptions, stating the absence of divers witnesses, who had been summoned for

him, by whom he expected to prove several material facts therein stated. The Court refused that motion also. It is stated in the bill of exceptions, that about 100 persons were summoned as jurors in the case, and that the prisoner challenged a large majority of them for cause, before the jury was formed; and that the prisoner examined those, thus challenged, as to their indifference, and that more than 15 of them had formed and expressed an opinion unfavorable to the prisoner.

Upon the trial, one Edmund Taylor, a son of the deceased, and of the age of 21 or thereabouts, gave evidence on the part of the State: That, after sunset on the 5th of September, 1848, he was in his father's corn field engaged in stacking fodder with his father, a negro man, and a younger brother—who had not age and capacity to be examined as a witness: That he, Edmund, was on a stack, which they were near finishing, and his father and the negro were throwing up fodder to him; when he saw the prisoner, riding about in the field of his uncle, John Taylor, to the north of them, and reeling as if drunk. At that time David Hildreth rode up to the fence on the South side of the field and asked, if they knew where Robert was; and upon being told where he was, David called Robert, who answered him; and David then rode around the field into a lane between the fields of William Taylor and John: That the prisoner soon afterwards pulled down the fence and rode up towards the stack, so as to have the deceased between him and the stack: that then David came in a different direction, and stopped on the other side of the stack, and about six or eight steps off: that the prisoner did not then appear to be drunk, and he asked, if they had not done stacking fodder: to which no reply was made, as the witness and the deceased were displeased with him on account of a State's warrant he had taken out against them not long before: that the prisoner then used very obscene and insulting

language to them, and turned his horse as if he were going to ride off; and the deceased then told him, he would indict him for pulling down his fence and coming into his field, and ordered him out: upon which the prisoner got off his horse and made towards the deceased, who gave back and passed the stack; that as he passed he told the witness to him give his knife, which the witness refused; that David then said, "take notice, I do not get off my horse:" That the prisoner continued to advance on the deceased and the latter to retreat, when he said to the prisoner, "I'll kill you, if you don't go out of my field;" but that the prisoner still advanced and the witness said to his father, "I would not let a man rush on me in my own field in that way"—whereupon David said, "hush, or I'll whip both of you," and the deceased picked up a doted chump and after giving back eight or ten steps, and while still giving back, he struck the prisoner about the head, when the witness saw the prisoner's hand strike the deceased in the breast, and then the deceased struck the prisoner again, and immediately exclaimed, "Bob Hildreth has killed me—he has cut my heart open"—and the deceased, bleeding very much, walked off about twenty steps and fell dead. The witness further stated, that the fight occurred between sunset and dark, and that the moon was shining, so that it was daylight and moon-light; that, when the prisoner got off his horse, he did not think he would hurt his father, as he noticed particularly to see, if he had a knife or stick in his hand, and that he did not discover either, though he was on the stack; that he did not see the prisoner raise his hand, while he was advancing on the deceased, and that he saw him strike but one blow, though there were two wounds; and that immediately afterwards he saw a bloody knife in the hand of the prisoner, with a blade four inches long.

Other witnesses gave evidence for the State, that the deceased was a small and infirm man, about sixty years old; that there were two wounds on the dead body—one, on the breast, about one inch deep and penetrating the breast bone, and appeared to be a stab with a knife; the other, on the left side, about three quarters of an inch wide and six inches deep, which was mortal.

Further evidence was given, that the prisoner leased a house from the deceased, situate about a quarter of a mile from that in which the deceased resided; and that, about four or five weeks before the homicide, the prisoner told a witness, the deceased was in the habit of watching his house to catch him trading with slaves, and he asked. if he would not be justified in whipping him—to which the witness replied he had better not do so, but appeal to the law. Other witnesses gave evidence, that, on the 13th of August 1844, the prisoner applied to a magistrate for a peace warrant against the deceased and his son Edmund, upon the ground, that they threatened to burn his house and also to do him personal injury: That the magistrate endeavored to put him off, and the prisoner said, if he did not grant him a warrant, he would take the law into his own hands: That, thereupon, the warrant was issued on the prisoner's affidavit, and the defendants therein were arrested and on examination discharged. Another witness deposed, that, about five weeks before the homicide, the prisoner asked him several times, if the deceased had not applied to him to watch the prisoner's house for the purpose of detecting him in trading with slaves; to which inquiries the witness replied, that Taylor talked a great deal, and that it was not worth while to mind him—and that, during the conversation, the prisoner said two or three times, "I will kill the old rascal;" and, the last time, he said, "I will kill him and you may see it." Another witness gave evidence, that, in the afternoon of the 5th of September, the prisoner

and his brother David came on horse-back to John Taylor's and drank some cider; but neither was drunk: That the prisoner asked the witness, if he had not heard William Taylor say, that he intended to burn down his, the prisoner's, house, and the witness replied, that he had not; and then the prisoner said, he would have him summoned, any how: That David then asked him, if he ever heard Taylor say, that a negro saw him, David, and his father lying in the road drunk: to which the witness replied, that he had heard the deceased say something like it—upon which David said, "I will go over and beat old Bill Taylor nearly to death:" That the prisoner and David then left John Taylor's, about an hour and a half before sunset, and rode over to James Hildreth's, which was to the North and in sight of John Taylor's and about a quarter of a mile off. Another witness gave evidence, that the two brothers got to James Hildreth's about an hour by sun; and that, after being there some time, the prisoner borrowed David's knife, saying he wanted to mend his bridle: that he opened and shut the knife twice and looked at it each time, and then put it into his pocket, and without mending his bridle, rode off North, in a direction from the deceased's house and field; but that after going some distance, he turned towards the deceased's plantation; and that in order to get there, he would have to pull down three fences. Further evidence was given, that the prisoner was arrested on a warrant the third day after the homicide, and was found in a thicket of briers in an old field, and that he had a slight wound on the forehead, and said that the deceased struck him there.

Upon this evidence, the counsel for the prisoner moved the Court to instruct the jury, that it was a case of mutual combat, in which the offence was extenuated from murder to manslaughter. But the presiding Judge refused to give that instruction, and told the jury, that the

rule was, that, if two persons engage in a sudden combat, and, after they become heated by the combat, one of them seizes a deadly weapon, or uses one in his hands, having no intent to use it when the combat commenced, and slay his adversary, it is but manslaughter. And after summing up the evidence, the Court instructed the jury, that, if the witnesses in this case were to be believed, the prisoner was all the time advancing on the deceased and the deceased all the while giving back; and that the killing, according to the testimony, if true, was not manslaughter, but murder.

The jury convicted the prisoner of murder, and from the sentence he appealed.

Attorney General, for the State.
No counsel for the defendant.

Ruffin, C. J. The Court finds no error in the record. It is the undoubted province and duty of the Court to inform the jury, upon the supposition of the truth of facts, as being agreed or found by the jury, what the degree of the homicide is. *Fost. Cr. L.* 255. *State* v. *Walker*, N. C. T. R. 231. If it were not so, there would be no rule of law, by which a killing could be determined to be murder, but the whole matter of malice or alleviation would fall to the discretion and decision of the jurors in each particular case, and there would be no mode of reviewing it, so as to reverse the decision, though erroneous. There could be no tyranny more greivous, than that of leaving the citizen to the prejudices of jurors, or the discretion of judges, as to what ought to be deemed an offence, which should, or should not, deprive him of his life. The only security for the accused is for the law to define *a priori*, what shall constitute a crime, and, in the case of capital punishment, when it shall be inflicted. It is one of the praises of our law, that such have always been

its provisions. The presiding Judge, therefore, did not transcend his power, but performed simply his duty, in directing the jury upon the point, whether the killing here amounted to murder or manslaughter, taking the facts to be as deposed to by the witnesses. The truth of the evidence, as far as appears, was not indeed contested on the part of the prisoner. On the contrary, he assumed it to be true, when he prayed an instruction upon it, in general terms, that this was one of those cases of mutual combat, in which the law holds a killing to be but manslaughter. The only question, then, is, whether the Court ought to have given the instruction asked, or whether that given was wrong; for an error, in either respect, would entitle the prisoner to a *venire de novo*. But we are of opinion, that there is no such error. For, upon the supposition that the evidence was true, the Court holds clearly, that the prisoner was guilty, not merely of manslaughter, but of murder, in point of law; and that the malice, necessary to constitute the killing murder, was implied by the law and was properly declared by the Court. It is true, there was evidence given of express malice, that is, of a previous ill-will of the prisoner towards the deceased and threats of killing him, and some evidence tending to show, that the prisoner, up to the period of the homicide, harbored such ill-will and went to the place for the purpose of killing Taylor or doing him great harm. It may be, that the evidence on that point might have been thought by the jury to establish the inferences, to which it tended. Whether it was or not, it is purely a matter of fact, whether, after such an interval between the threats and the killing, the prisoner acted on the old grudge on this occasion, as well as whether such previous malice existed, and neither the presiding Judge nor this Court has authority to form an opinion upon it. His Honor, indeed, left it to the jury, whether the evidence was true or not, and gave his instruction upon the hypothesis that the jury

found it to be true. They have said it was; but that only goes to the facts of the previous ill-will and threats, because to those alone did the witnesses depose. They did not, and could not, testify to the continuing of the ill-will up to the homicide, and that the prisoner acted on it in slaying. That is not capable of being directly proved by witnesses, but is an inference as to the actual state of the party's mind and intention, upon which the act of killing was done; and it was, therefore, proper for the jury and not the Court to draw it. If the case depended on that enquiry, and the killing would not be, or, rather, was not murder, without any reference to the evidence of express malice, we should hold, it was erroneous to direct the jury, that the prisoner was guilty of murder, without submitting to the jury the enquiry, as to the continuing existence of the express malice. But we conceive that, independent of that point, and without any regard to such parts of the evidence as are relevant to it simply, the prisoner is guilty of murder upon the facts and circumstances attending the homicide, by themselves implying malice. From the admitted fact of the homicide the law presumes malice, and the matter of extenuation must arise out of the evidence of the killing itself, or must be otherwise proved by the prisoner. Here the whole turns on the testimony of Edmund Taylor, the only witness present at the fact, and upon the number and nature of the wounds. That must be assumed to be true, because the Judge founded his instruction upon the supposition, that all the evidence was true. Taking it to be true, the prisoner cannot deduce from it any alleviation of guilt, short of murder. That, which was insisted on for him, is not tenable: namely, that it was a case of mutual combat, and therefore the offence was extenuated There is no such rule of law; for, although in many cases of mutual combat, a killing is but manslaughter, because done upon sudden heat, yet there are many others, in which a killing in such

a combat is murder, because the circumstances show, that the slayer was from the beginning actuated by malice, or in other words, intended to take or endanger the life of the other by an undue advantage in an unequal combat. And the rule on the point was, we think, laid down with substantial correctness in this case. Here was provoking language and behaviour on both sides; so that it would matter not, which gave the first blow, if the fight was fair and intended by the prisoner, at the first, to be fair. But, if one, upon a sudden quarrel, draws his sword and makes a pass at the other, whose sword is then undrawn, and then the latter draw his sword and a combat ensue in which he is killed, it is murder; for, by making his first pass, when the adversary's sword was not drawn, the assailant shewed he sought the other's blood, and the endeavor of the other to defend himself, which he had a right to do, will not excuse the killer. *Foster* 295. Mr. East states the rule to be, that, if on any sudden quarrel blows pass, without any intention to kill or injure materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is but manslaughter; but that, when an attack is made with a dangerous weapon, the party assailing, without sufficient legal provocation, must put the party assaulted upon an equal footing in point of defence, at least at the onset, 1 *East. P. C.* 242, 3. So, Russell says, that, although the use of a deadly weapon after the combat began will not make the offence more than manslaughter, if the combat was equal at the onset, yet the conclusion is different, if there be any previous intention, or preparation, to use such a weapon in the course of the affray. 1 *Russ. Cr. L.* 446, 497. In those positions he is supported by the cases cited by him. In *Whiteby's case*, 1 Lewin's Cr. cases, 173, Mr. Justice Bayley states the law thus: when persons fight on fair terms, where life is not likely to be at hazard, if death ensue, it is

manslaughter: and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws in the heat of blood a deadly instrument and inflicts a deadly injury, it is manslaughter only; but if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. In *Anderson's* case, the prisoner and Levy quarrelled and went out to fight, and the latter was found to be stabbed in many places and died immediately, and it appeared that the prisoner had a knife, and that no body else could have given the stabs, and the jury were told, it was murder, if the prisoner used his knife privately from the beginning, or, if, before the fight began, he placed the knife so that he might use it during the affray and used it accordingly. These principles and cases fully establish the correctness of the direction in this case. The prisoner, without exhibiting his knife or giving any notice of it, prepared the knife before hand, or, at all events, drew it before any blow had passed, and in the dusk of the evening he pressed on the deceased, an infirm and weakly old man, who retreated eight or ten yards, and, as soon as the prisoner got near enough to strike, he gave the mortal stab. That he must have drawn the knife at the beginning, or, at least, before any blow on either side, is absolutely certain, if Edmund Taylor told the truth; for the witness did not see the prisoner draw the knife, nor, indeed, see it at all until after the killing, and he says the stroke by the prisoner immediately followed that given by the deceased, and that the deceased then exclaimed, that he was killed. That the deceased made defence as he did, can make no difference; for, against such an assault, as Mr. Justice Foster says, he had a right to endeavor to defend himself. It does not appear, that the weapon, with which the deceased struck, was of a nature, that was likely to do much bodily harm, but, from the description of it and

its effects, quite the contrary. It is the case, therefore, of an attack by an armed upon a feeble unarmed man, in which the latter endeavored throughout to avoid the conflict, and the former gave a mortal blow, with a deadly weapon, as soon as he was able to give a blow at all—the weapon not being drawn in the course of the scuffle, but being prepared before any actual scuffle, or a blow on either side. The impulse to give the mortal stroke was not excited, during and by a combat. It is clear, that the prisoner sought and took that undue advantage in the fight, which prevents the law from attributing the act of killing his fellow man to human frailty and the sudden transport of passion, excited by the provocation of a blow or during an affray, and lays it to that malignity of heart which seeks the life of another without any legal provocation. The Court, therefore, holds that in point of law there was no error in either the instruction given, or, of course, in refusing that asked.

It is the province of the Court, in which the trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. It must be so; else it would be in the power of a prisoner to postpone a conviction indefinitely, however clear his guilt, by making affidavits with the requisite matter on the face of them. The temptation to perjury is so strong in capital cases, that it is an established practice on the circuits to distrust affidavits after one continuance or removal, and scrutinize them narrowly. The presiding Judge must dispose of such applications in his discretion; and, as in other cases of discretion, his decisions cannot be reviewed here, but are final.

Per Curiam. Ordered to be certified accordingly to the Superior Court of Law of Richmond County.

THE STATE *vs.* DAVID HILDRETH.

One, who is present and sees that a felony is about to be committed and does in no manner interfere, does not thereby participate in the felony committed. Every one may, upon such an occasion, interfere, to prevent, if he can, the perpetration of the felony, but he is not bound to do so, at the peril, otherwise, of partaking of the guilt. It is necessary, in order to make him an aider or abetter, that he should do or say something, shewing his consent to the felonious purpose and contributing to its execution.

It is a general rule, that the declarations of a party accused of a crime, made in his own favor, after the time of the alleged commission of the crime, are not evidence for him.

Appeal from the Superior Court of Law of Anson County, at the Fall Term 1848, his Honor Judge PEARSON presiding.

The prisoner was indicted for the murder of William Taylor, as being present, aiding and abetting Robert Hildreth; whose case has been before the Court at this term. As far as the evidence was stated in Robert's case, it is much the same with that, which was given in this case. In addition, however, the witness, Edmund Taylor, stated, that, as soon as his father made the exclamation, that he was killed, he, the witness, jumped off the stack and seized a fence rail to strike Robert, and that the negro man took it from him. Robert then got on his horse and the witness cursed him for killing his father: whereupon David said: "are you cursing me?" and the witness replied, that he was not, but was cursing Robert, when David said again, "he is my brother, and if you curse him, I will put balls through you." Then Robert and David rode off together, at the instant William Taylor fell and expired.

Evidence was also given on the part of the prisoner, that Edmund Taylor was examined before the coroner's inquest and then stated, that the prisoner made use of the expression, "Take notice I do not get off my horse," after the homicide, and not before or during the affray: and that he was of weak understanding, and that the prisoner had no pistol with him. On the contrary, evidence was given, that he had competent capacity and a good character.

The credibility of Edmund Taylor was much discussed by the counsel on each side. The presiding Judge summed up the several suggestions made at the bar on that point, and informed the jury, that he had no right or wish to intimate an opinion on them, but that they were to be weighed by them. And he then instructed the jury, that, in order to the conviction of the prisoner, it was necessary for the State to establish two things. The first was, that Robert Hildreth killed William Taylor as charged in the indictment, that is, murdered him. And upon that point the jury was instructed, that, if upon the whole matter they were satisfied that Edmund Taylor was able and willing to tell the truth and had told the truth, Robert Hildreth was guilty of murder, and the State had made out the first allegation: otherwise the prosecution was at an end, and the prisoner was entitled to an acquittal.

The second thing to be established was, that the prisoner was present, aiding and abetting, at the murder. And the Court thereupon instructed the jury, that if one, who is present, does or says anything, calculated and intended to make known, that he would help, if need be, by taking a part in the fight, or by keeping off others, or by aiding an escape after the deed should have been done, that is an aiding and abetting; and that, if the jury should believe that the prisoner made use of the words, "hush, or I will whip you both," in the manner stated by

the witness, with the intention of discouraging and deterring Edmund Taylor and the negro from interfering, that was sufficient to constitute aiding and abetting, and the prisoner would be guilty of murder or manslaughter, as they might find the facts to be on the other points following: That if the prisoner knew, before they entered the field, of the intention of his brother to attack Taylor and to use the knife in the fight, and there was an understanding between them, that the prisoner should be present and aid, he would be guilty of murder, as well as his brother: And if there was no such previous understanding, and the prisoner, after he entered the field, discovered, that his brother intended to use the knife in the fight in time to have prevented it, he was also guilty of murder. And that, in enquiring, whether the prisoner had such knowledge, the jury might consider, as a circumstance, that no expression of surprise or regret came from the prisoner after the act was done. But, if the prisoner knew of the ill-will of his brother to Taylor and that he intended to attack him, but did not know of his intention to use the knife in time to prevent it, and the fatal result was unexpected to him, then the prisoner, by reason of his engaging in the unlawful beating, would be guilty of manslaughter, but of no more.

The jury found the prisoner guilty of murder, and, after sentence of death, he appealed.

Attorney General, for the State.
Strange, for the defendant.

Ruffin, C. J. In the case of Robert Hildreth at the present term, the Court had occasion to give an opinion on the degree of the guilt of that person, according to the evidence given by the witness, Edmund Taylor; which was in accordance with the instruction given in the present case, in which the Court confined the attention of

the jury, upon that question, to the testimony of that witness only. The facts deposed to by him are substantially the same in both cases; and therefore there is nothing for this Court to add on that point. The only material difference in the cases is, that, on Robert's trial, there was no attempt to discredit that witness, while on David's, there was evidence given both of his weakness, and of a falsehood or a mistake in his testimony. But no error, as we think, was committed by the presiding Judge in respect to that part of the case; for, he expressly avoided expressing any intimation of opinion on the credit due to the witness, and as expressly told the jury, that it was exclusively for their consideration; and we hold, that it was clearly within the appropriate powers and duties of the Judge to lay distinctly before the jury the various considerations, arising out of the evidence, tending to sustain or impeach the credit of the witness—leaving it, all the while, to the jury exclusively to judge of their weight.

The Court likewise agrees, that aiding and abetting was properly explained to the jury, and that they might have found the prisoner guilty, accordingly, if he used the words deposed to with either of the intentions supposed; provided, there had been a previous understanding between the brothers, that one of them should kill the deceased, or do him great bodily harm, and that the other should abet it by his presence and encouragement. If it could be seen that the verdict was founded on that ground, we should deem it undoubtedly correct in point of law. But that cannot be assumed; because the case was also left to the jury upon a supposition, that there was no such previous understanding, and that Robert was guilty of murder upon the malice implied by the circumstances, merely, of the killing—in which case the jury was instructed, in the alternative, that the prisoner was guilty of murder, if, after he entered the field, he discovered that his brother intended to use the knife, in time to have prevented

him. The jury may have given their verdict on this latter instruction; and, therefore, if it ought not to have been given, the conviction ought not to stand. The Court is of opinion, that it ought not to have been given. It is to be observed, in the first place, that, upon the evidence, there was no opportunity for the prisoner to discover, "after he entered the field," that his brother had prepared or meant to use a deadly weapon, until the rencounter commenced; for the two brothers came in opposite directions and had not been together in the field, until the prisoner rode up and stopped eight or ten steps on one side of the stack, when Robert and Taylor were on the other. Again, it is apparent, that he could not then have made the supposed discovery, until after the fight began, when Taylor retreated past the stack and Robert pursued, so as to bring the parties on the same side of the stack with the prisoner, and in his view. Such is the state of facts to which the instruction is to be applied; and, thus applied, we think it inaccurate. For supposing the prisoner to have no previous concert with his brother, and that, during the combat, he first discovered, that the other intended to use a deadly weapon, we think, he was not guilty of murder, although he made the discovery in time to have prevented Robert from actually giving the stabs. For one, who is present and sees that a felony is about being committed and does in no manner interfere, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something, shewing his consent to the felonious purpose and contributing to its execution, as an aider and abetter. Therefore, the proper instruction, in the case supposed, would have been, that if the prisoner, after discovering

the deadly intention of his brother, instead of preventing its execution, deterred others from preventing it, or incited his brother to go on, then he would be guilty of murder. If the case had been so put explicitly to the jury, it seems highly probable, they could not have convicted the prisoner of murder. For, upon the hypothesis assumed, that the prisoner discovered the fatal purpose of Robert, for the first time, during the combat, there is nothing to shew, that he used the expression, "Hush or I'll whip you," after such discovery, or in any other way gave his sanction to the attempt or the deed. His presence did in no way contribute to the fact; or, at all events, it did not appear that he could so have intended. It is true, that he uttered no expression of surprise or regret at the fact; which might, indeed, with other things, have some weight in inducing a belief of some concerted action between the brothers. But, of itself, it affords no evidence that the prisoner assented to or meant to encourage the perpetration of a murder, which he at that time first discovered. Even the witness, Edmund Taylor, expressed no such surprise or regret, though he says the event was unexpected by him, and that he endeavored to avenge it. Indeed, it seems to the Court, upon a calm consideration of the circumstances, that there was no evidence, upon which the case should have been left to the jury on the question, whether the prisoner did aid and abet after his discovery of Robert's intention to use the knife, as already supposed; or, even, on the other question, whether the prisoner knew of such intention of Robert before he actually used the knife in giving the mortal blow. For the witness was in a much better situation to discover it, than the prisoner was; and it appears, that from the imperfect light, the cautious concealment of the instrument by Robert, and his sudden onset, the witness was unable to perceive the knife, although he looked particularly for that purpose. How, then, can it

be inferred, without other evidence, that the prisoner, on the other side of the stack and further off, saw the knife and immediately knew the extremity to which the assailant would go with it? Upon these grounds the Court deems the conviction erroneous, and directs a *venire de novo*.

As the case may be brought to another trial upon the allegation of express malice and preconcert between the brothers, it seems proper to dispose of a question of evidence, which arose on the former trial and might possibly be made on another. The point was this. The prisoner offered to prove by his sister, that, after dark, on the night of the homicide, she heard Robert and David in conversation near their father's, and about three or four miles from Taylor's; and that, before they perceived her, and when the prisoner had no reason to think he was overheard, she heard the prisoner say to Robert, "You ought not to have done so," and that, from his voice, she knew that he was crying. The Court rejected the evidence. We concur in the decision. The general rule is, that a person's own declarations are not admissible for him. The rule is not founded on the idea, that they would never contribute to the ascertainment of truth; for, very often, they might be entirely satisfactory. But there is so much danger, if they were received, that they would most commonly consist of falsehoods, fabricated for the occasion, and so would mislead much oftener than they would enlighten, that it was found indispensable, as a part of the law of evidence, to reject them altogether, except under a few peculiar circumstances. This case does not fall within any established exception. It is impossible to ascertain, whether the prisoner had or had not perceived his sister; or whether he had no reason to believe that he was over-heard by her or some other member of the family, or some one else; or whether his tears were sincere or feigned. It was merely a declaration, subsequent

to the event alluded to—if the allusion was to this occurrence—and not forming part of the transaction; and, therefore, the objections, on which the general rule rests, apply with full force against its admissibility.

Per Curiam. This opinion ordered to be certified to the Court below, that they may proceed accordingly.

PLEASANT BLACK vs. LABAN WRIGHT, EX'OR, &c.

Proof of the hand writing of a deceased subscribing witness to a bond is not, strictly, *prima facie* evidence of the execution of the bond, though it will authorize the reading of the instrument to the jury. But the jury must weigh this, together with the other circumstances given in evidence, and, from the whole, determine whether the alleged instrument was executed or not.

It is among the strongest circumstantial proofs against a person, that he omits to give evidence to repel circumstances of suspicion against him, which he would have it in his power to give, if those circumstances of suspicion were unfounded.

Appeal from the Superior Court of Law of Rockingham County, at the Spring Term 1849, his Honor Judge Dick presiding.

This is an action of debt, commenced January 27th 1844, on a bond to the plaintiff for $111, dated January 11th 1838, and payable one day after date. Plea, *non est factum.*

On the trial the plaintiff produced the instrument, which purported to be executed by the testator by making his mark, and to be attested by John Wall, junior, a

son of the testator; and he proved the death of the subscribing witness and his handwriting.

The defence was, that the alleged bond was a forgery. In support thereof the defendant gave evidence, that the instrument was all in the handwriting of the subscribing witness, John Wall, junior, and that he was a man of bad character, as early as 1838, and had the reputation of being a gambler, swindler, and passer of counterfeit money, and was unworthy of credit. The defendant also gave evidence, that in April 1841, his testator gave to the plaintiff, on dealings between them, a bond for $71 74, and that in May 1842, the plaintiff brought a warrant thereon and took judgment against the obligor, who staid it, and died in August following. The defendant also gave evidence that his testator could not write, but was a marksman; and he called one King as a witness, who stated, that, for the last twenty years of the testator's life, he, the witness, had done the most of his business for him, such as writing and making settlements for him, and had often seen the testator make his mark to bonds and other instruments, so that he believed that he could distinguish it from the marks of other persons; and he deposed, that, in his opinion, the mark of the alleged bond was not that of the testator.

The defendant offered further to give evidence, that the plaintiff had a book account against the testator for dealings commencing in September 1838 and ending in April 1839, and that, at the latter day, the testator paid it, and took the plaintiff's receipt thereon. But the Court rejected the evidence.

The defendant offered further to give evidence, that Wall, junior, was dissatisfied with his father's will. But the Court rejected this also.

The defendant then offered further to give evidence, that the plaintiff had two other instruments, purporting

to be bonds given to him by the testator, and to be witnessed by John Wall, junior, bearing different dates from that sued on in this action and subsequent thereto; and that they were all in the hand-writing of John Wall, jr.: And the defendant alleged that, in fact, the three instruments were written by the said John Wall, junior, upon the same sheet of paper and at the same time, and that the same would so appear upon inspection of the instruments; and to that end the defendant offered the other two alleged bonds in evidence. But the Court refused to receive any part of this evidence.

The plaintiff then gave evidence, that John Wall, the elder, had said that his son, John, was running him in debt and would ruin him, if he did not stop.

The Court instructed the jury, that the plaintiff had made out a *prima facie* case, by proving the death of the subscribing witness and his hand-writing, which entitled him to a verdict, unless they were satisfied, that the bond was a forgery: and that the only evidence tending to prove the forgery was the testimony of King, and that relating to the bond for $71 74, and the bad character of John Wall, junior.

The jury found for the plaintiff, and the defendant appealed from the judgment.

No counsel for the plaintiff.

J. T. Morehead, for the defendant.

RUFFIN, C. J. The Court thinks there ought to be a *venire de novo*. We are not satisfied with the instructions given to the jury on the case made by the evidence, which went to them, and we are also of opinion, that proper evidence was excluded.

Although proof of the signature of a dead subscribing witness is sufficient to allow the instrument to go to the jury, yet, where there is also evidence tending to disprove

the execution of the instrument, we think it is not correct to say, that the evidence of the hand writing amounts to *prima facie* proof of the plaintiff's case: that is, as defined here to the jury, such as *entitled* the plaintiff to a verdict, unless the jury should be *satisfied* by the evidence on the other side, that the instrument was a forgery. That is changing the *onus* of proof improperly, as it seems to us; for, in such a case, it must be a question for the jury to determine, according to the weight of circumstances on each side, whether in fact the instrument was or was not executed. It is to be remarked, that, there being no direct proof on either side, as to the execution, it is purely a question of circumstantial proof. The evidence of execution from the proof of the hand-writing of the attesting witness is nothing more than a presumption, that what the dead man witnessed was executed. It is so commonly true, that the law allows it to be evidence to the jury, on which they may find the fact. But it is not conclusive; nor has it, that we are aware of, any such peculiar virtue, as to oblige the jury to find according to the probability it raises against opposing probabilities, unless the latter be of such a character as to leave no doubt with the jury to *satisfy* them, that, in fact, the person, whose bond it purports to be, did not execute it. In such a case, as in others, the *onus* as to the execution is on the party setting up the deed; and, although he is entitled in law to read the paper to the jury, upon proof of the signature of the witness, yet there may be suspicious circumstances shewn on the other side, which may prevent the jury from being satisfied with the evidence of the hand-writing of the witness, by itself, as *establishing* the execution: a thing to be done by the plaintiff, before he can entitle himself to a verdict. Hence, in such cases of suspicion, the plaintiff generally resorts to other evidence, in support of the presumption from the hand-writing of the witness: such as that he was a man of fair standing;

that he, the alleged obligor, acknowledged that he gave the bond; or that the signature is in the hand writing, or that there were dealings between the parties, on which such a debt might probably have arisen; or the like. In fine, the presumption of execution from the proof of the hand writing of the witness cannot stand higher than dirict proof of execution by the subscribing witness himself; and, as in the latter case, though the bond goes to the jury, yet they are to judge of the credit of the witness according to all the evidence, so, in the former case, all the presumptions on both sides are for the consideration of the jury, and unless they preponderate in favor of the plaintiff, it ought to be found that he failed to establish the issue on his side.

In like manner it was calculated to mislead the jury, to instruct them that the testimony of King and that relating to the bond for $71 74, and the bad character of the son, was the *only* evidence tending to prove the forgery. It is true, that was all the affirmative evidence on that point. Indeed, but a part of that was of that kind of proof; for the evidence as to the son's character and the small bond, afforded only negative presumptions, that the testator did not execute the bond in suit. But the circumstances afforded other evidence of the like negative character, relevant and material, which might have had much weight, had it been submitted to the jury in its proper connexion. It is classed by writers upon the law of evidence and presumptions, as among the strongest circumstantial proofs against a person, that he omits to give evidence to repel circumstances of suspicion against him, which he would have it in his power to give, if those circumstances of suspicion were unfounded. 3 *Stark. Ev.* 487. Hence when witnesses, for example, depose that the signature to a bond is not in the hand-writing of the person sued, and the obligee and alleged obligor live near each other and in the immediate vicinity of the place of

trial, and the latter is a man of extensive business, whose hand-writing is generally known, and the former calls no witness to the point, when he might so easily do so, if the signature were genuine, the omission affords the same kind of evidence against the deed, that the omission of the possessor of property, recently stolen, to account for his possession, does against him. It is true, that it is not applicable to the case of a marksman; but it is but one example of that species of evidence in reply, which the party might give, and, no doubt, would give, if his case were honest. For example, here the defendant gave evidence, that, three years after the date of the instrument sued on, the testator gave the plaintiff a bond, and shewed also the consideration on which it was founded, and that, without much indulgence, the plaintiff sued him on it. Why, then, did the plaintiff, if he at that time had the bond, which is now in suit, indulge the testator on it for six years? To meet that circumstance, the jury might well require the plaintiff to show by his clerk, or some member of his family at least, that in fact the paper was in his possession during that period; that there was a communication between him and the testator, and that the forbearance was extended at the latter's request; or that there had been at the date of the bond, or prior, a transaction on which the testator might have owed the sum. The total omission of all such proof furnishes, in itself, presumptive evidence of no slight force. It was, therefore, erroneous to lay it down, that there was no evidence in the cause, but the isolated circumstances enumerated.

The observations just made serve also to render it plain, that the rejected evidence of the dealings in 1838 and 1839 was relevant and proper. It was in the nature of connected evidence of the dealings between the parties for several years, and the frequency of settlements and speedy collection of the sums due; and thus—espec-

ially, in absence of all proof in reply—to render it less probable, that the plaintiff would have waited so long for the debt now demanded, if it existed as early as January 1838, and, thus, with the other circumstances, raise the inference, that the bond was not given then, nor, by consequence, at anytime.

Upon the same principle—and also for other reasons—the evidence ought to have been received in relation to the other bonds held by the plaintiff, on which he had probably instituted other suits against the defendant. It is true, that evidence, simply, that the plaintiff or his subscribing witness had forged another bond on the testator, would be no proof that the present instrument is a forgery. But the object here was to connect the three instruments together, and to shew that the fabrication of the whole was one act. Keeping in mind, that the plaintiff withheld three bonds on the testator, payable to the plaintiff; that they were all in the handwriting of the same subscribing witness, a man of very bad character; that they were of different dates, so as to purport that they had been made at different times; it certainly would be adding great and just suspicion to the transaction, if it should appear, that they were all made at one and the same time, and the plaintiff should still omit to show, by any dealings at any time, a fair origin for either. That they were written on the same sheet of paper made at the same time, though bearing different dates, might appear by direct proof; but that is hardly to be looked for in such a case; and certainly inspection is a mode in which the jury may, to some extent, judge, as from the color of the ink, the kind of pen, the water marks on the paper, or the fitting together of the different pieces, as in the case of Indentures anciently, that the work was all done at once. If such was the fact, it increases the force of the presumptions from the defect of proof as to a consideration; as the greater the magnitude of the dealings,

the greater the likelihood, that they would be known and capable of proof; and, certainly, some reason ought to be given in explanation of the extraordinary circumstance, that, notwithstanding the bonds were written and executed at the same time and on the same sheet of paper they should be dated differently, so as to purport to have arisen from different transactions. We must say, that, in our judgment, such evidence would have added greatly to the suspicions in the case, and was, therefore, fit to be laid before the jury, as tending to impair the presumption of execution, which arose from the attestation of the writer of the several instruments.

PER CURIAM. Judgment reversed and *venire de novo*.

THE STATE vs JOHN UPCHURCH.

The Act of 1846, ch. 70, entitled "an Act to protect houses and enclosures from wilful injury," alters the Act of 1836, 1 Rev. Stat. ch. 347, so as to reduce the offence of burning a mill-house, &c., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death.

In this State, where one is indicted and tried as for a felony, yet the facts averred in the indictment do not support the charge of felony, but amount to a misdemeanor, the Court may give judgment for such misdemeanor.

Where a defendant was convicted on an indictment for a felony and appealed from the judgment thereon to the Supreme Court, and the error assigned in this Court was, that the facts stated in the indictment did not amount to a felony, the Supreme Court, though it reverses the judgment for this error, yet will, (under the provisions of the Act establishing the Court) give directions to the Court below to give judgment for a misdemeanor, where it appears that is the judgment, which should have been there rendered.

Appeal from the Superior Court of Law of Franklin County, at the Spring Term 1849, his Honor Judge SETTLE presiding.

The prisoner was convicted of arson, in feloniously, unlawfully, wilfully and maliciously burning a saw mill-house, the property of Malthus D. Freeman; and, when brought up for sentence, his counsel insisted, that no sentence could be passed on him, because, since the act of 1846, the offence was but a misdemeanor; and because the indictment charged it to be a felony, and, therefore, there could not be judgment on it as for a misdemeanor. The Court, however, proceeded to judgment of death, and the prisoner appealed.

Attorney General, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. The principal question arises on the first section of the Rev. Stat. ch. 34, and the act of 1846, ch. 70. The former enacts, "that no person, who shall be convicted of any wilful burning of any dwelling house, or any part thereof, or any barn then having grain or corn in the same, or store house, grist or saw mill-house, or any building erected for the purpose of manufacturing any article, shall be admitted to the benefit of clergy; but every person, so convicted, shall be excluded thereof and shall suffer death." The latter is entitled "an Act to protect houses and enclosures from wilful injury;" and it enacts, "that, if any person shall unlawfully and wilfully burn any uninhabited house, out house, or other building, or shall unlawfully and wilfully demolish, pull down, deface, or by other ways or means destroy, injure, or damage any dwelling house, or any uninhabited house, out house, or other building, or shall unlawfully burn, &c., any fence, &c., he or she shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine or imprisonment or both, at the discretion of the Court, in which such conviction shall be had;" and it further en-

acts, that it should be in force from the 1st day of March following.

Several considerations induce the belief, that, by the Act of 1846, it was in fact intended merely to supply those defects in the common and statute law, whereby certain injuries to houses and enclosures were dispunishable as crimes, and treated as civil injuries only. It had been held, that burning and pulling down vacant houses or enclosures were not indictable, as for malicious mischief at common law; and the probability is, as urged by the Attorney General, that the Act meant simply to make acts of that kind indictable, and to leave those acts, which were before crimes, to the operation of those laws, which constituted them crimes. The hypothesis is rendered plausible by the circumstances, that the Revised Statute specifies certain buildings as the subjects of felonious arson, while that clause in the subsequent act, which concerns burning, does not designate one of them by name; that it has no express clause of repeal, and makes no allusion in its title or body to the Revised Statute: that it was not to operate immediately, but to go into force at a future day, thus indicating a purpose to create offences thereby and to give notice of them. Moreover, it is not known, that any legislative dissatisfaction was expressed with the protection, which the previous law afforded for dwelling houses and the other erections enumerated in the Act of 1836. Hence, it may be well argued, that the intention was to protect buildings, which were not before protected, and not to take away any protection, then existing. But those considerations cannot authorize a construction in opposition to the plain words of the act. If it was a remedial statute and concerned private rights merely, they would have more weight, and, perhaps, be sufficient to justify the Court in reading the Act so as to make it meet the mischief. In questions touching crimes and punishments, however, and especially where life is

affected, statutes are to be received more literally, both in the provisions creating or abrogating crimes, and affixing punishments. The interpretation of such statutes is to be benignant to the accused; and, therefore, words in his favor cannot be rejected. It is perfectly settled as a rule of construction, that, if, by the common or statute law, an offence, for example, be a felony, and a subsequent statute by an enactment, merely affirmative, lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. If this act had said, that the burning of any uninhabited house or out house should be a misdemeanor, then it would be clear, that the dwelling house—that is, an inhabited house—and its out-houses would have been left to the protection of the old law. The subjects of the enactments would be different and the two acts could not well stand together. But suppose that part of the act had said, in so many words, that the burning of any dwelling house, uninhabited house, or out house, saw mill house, or barn, should be a misdemeanor, punishable by fine or imprisonment. In that case it could not be argued, that the former act was not repealed, which made the burning of a dwelling house or mill a capital felony. The two provisions would then be absolutely inconsistent in respect to one and the same building, mentioned specifically in both acts. In effect, it is the same thing here, at least as respects mills and the other erections mentioned in the act of 1836, excepting, perhaps, dwelling houses. It is so by force of the words "other buildings" in the act of 1846: which are broad enough to include, and do therefore include them, unless excepted expressly or by a plain and almost necessary implication. Perhaps a dwelling house may be excepted out of the operation of the clause in the act of 1846, which relates to the burning of houses, and left under the act of 1836, because, in the clause, which immediately follows, and relates to destroying or defacing

buildings, dwelling house is one of those enumerated and protected. "Dwelling house" was inserted there, because, before, the defacing of it was not a crime, any more than the defacing of an "uninhabited house," and therefore they alike required protection then; and hence the inference is rational, that "dwelling house" may have been omitted in the prior part about burning, because it was already a felony to burn that. Perhaps, that may be so; but it is at least doubtful, and it is to be hoped the Legislature will not allow such a doubt to rest upon so important a point as the security of men's habitations from the deliberate and diabolical act of burning, and the degree of punishment to be inflicted therefor. But if that structure of the two clauses of the sentence will justify that construction as to dwelling houses, it must, necessarily, be restricted to them and cannot extend it to barns and mills; because neither barns nor mills are mentioned in either clause of the act of 1846, but in both are included, if at all, under the same description, "other buildings." For, when it is argued that those words "other buildings" do not include dwelling houses, as the subjects of arson, for the reasons just assigned; and, therefore, that they do not include barns and mills, since, like dwelling houses, they also were protected by the Act of 1836, the answer presents itself, that these barns and mills are not within any part of the act of 1846, and thus one of its main objects would be defeated. The analogy between dwelling houses and barns and mills must necessarily be kept up throughout, if acted on at all; and therefore, if a mill be not within "other buildings" as to the burning, because a dwelling house is not, so neither can it be as to defacing or destroying, for the same reason. Yet it is very certain, that the Legislature would be much surprised to hear, that, notwithstanding they have enacted, that wilfully to demolish, pull down, deface, or by other means destroy any dwelling house, uninhabi-

ted house, or *other building*, should be a misdemeanor, yet the Courts held it to be no offence to pull down a mill or for a mob to demolish a cotton factory. Undoubtedly that part of the act does protect all buildings, including mills, from malicious destruction. It seems to follow necessarily, that under the very same terms they must be included in the prior part of the section, although, in the one clause, the act creates a crime in respect to them, and, in the other, it lessens the crime previously existing in respect to them, and mitigates its punishment. It is possible, this may not have been intended by the Legislature, and that the phraseology of the bill may have been adopted from inadvertence. If so, it is in the power of the Legislature to alter it. But, in the mean time, the Courts must be governed by the language used; for that is the only light in this case to guide us to the intent. When the Legislature says expressly, that the burning of any "uninhabited house or *other building*" thereafter "*shall* be deemed a misdemeanor," it is impossible for the Court to hold, that, according to the law as it previously stood, the burning of another building, namely, a saw mill, is still a capital felony. The Court, therefore, holds, that the prisoner's offence was not a felony, and that he was erroneously sentenced to be hanged.

The effect of the foregoing conclusion is now to be considered. For the prisoner it was contended, that, although he was conviced of an act, which is in law a misdemeanor, yet he could not be punished for it, because the indictment charged it as a felony. The reason does not strike one as very satisfactory; for the truth appears upon the record, so that the appropriate punishment for the offence, as it legally is, may and must be inflicted. It does not raise the grade of a crime, although the indictment does apply the epithet "*felonice*" to that, which is not a felony. As, if an indictment charge that one "feloniously an assault did make" on another, it would

still be but an indictment for an assault merely. It is true, that in England, a count for a felony and one for a misdemeanor cannot be joined; for, by the law of that Country, the modes of defence and trial are different. It is probable too, that there an indictment might not be held good, which charged a misdemeanor as a felony—especially, if it appeared in the record, that the party was tried as for a felony; because in that case the accused would not not have had the benefit of counsel, to which he would have been entitled, if tried for a misdemeanor. *Webster's case*, 1 Leach. 12. 1 *Chitty Cr. L.* 250. But those reasons have not the same force in our law. Our Courts would no doubt not suffer the accused to be embarrassed by different counts of felonies and misdemeanors, and would put the prosecuting officer to an election to proceed on one or the other. But the accused is put to no disadvantage here by charging that as a felony, which is not one. In the first place, as has been observed, charging it to be a felony does not make it one; and the trial might still be had as for the misdemeanor, and commonly would be. But if the trial were as for a felony, the accused would have no cause for complaint; for, instead of impairing his rights, it would add to his privileges, as he would, in each case, be entitled to counsel upon a trial as for a felony, and he would have thirty five challenges of jurors, whereas he is entitled to only four in other cases. We can see no ground, therefore, why, upon such a conviction, the Superior Court might not have sentenced the prisoner to fine and imprisonment.

Another enquiry follows; which is, whether that can now be done. The Court is of opinion, that it may. At common law, the rule, as to the effect of reversing a judgment for error in the judgment, appears to be different in criminal and civil cases. In the latter, where the error is in the judgment merely, the Superior Court is wisely allowed to reverse that given and then to give

such judgment as the Court below ought to have given; for the merits have been tried and further litigation is useless. But Lord COKE lays it down with respect to criminal cases, that "if the judgment be erroneous, both that and the execution and all former proceedings shall be reversed by writ of error"—3 *Inst.* 210; and the passage is cited by Sergeant Hawkins with approbation. 2 *Hawks. P. C. B.* 2 *C.* 50, *S.* 9. Although, at one time, the position seems to have been doubted, yet it has been more recently held, that upon reversal for error in the judgment, as where the proper punishment was death, but that laid was transportation, the Court of error had not power to pass the proper sentence, nor remit the case for that purpose to the Court which tried it, but was obliged to discharge the prisoner. *Rex* v. *Ellis*, 5 B. and C. 395, *Rex* v. *Bourne*, 7 Ad. and Ellis. 58. So that, although the conviction be regular and proper, an error in a sentence precludes the power to give a right one; and from the recent case of O'Connell, such seems still to be deemed law by the highest tribunal in that Country, as upon the reversal of the judgment in the House of Lords, the accused was not sent back for a proper sentence, but discharged. We own, that we can perceive no good reason for the rule; and therefore that we consider the Legislature of the State wise in having altered it, as, we think, has been done. In prescribing the jurisdiction of this Court, the Statute enacts, that the Court shall have power to determine all questions at law, brought before it by appeal from a Superior Court, and in every case may render such sentence and judgment, as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; provided, that, in criminal cases, the decision of the Supreme Court shall be certified to the Superior Court, which shall proceed to judgment and sentence agreeably to the decision of the Supreme Court and the laws of the State. It thus appears that this Court

in no criminal case gives judgment—either modifying or even affirming the judgment below. But it decides upon the whole record what ought to have been the judgment, and certifies that accordingly to the Superior Court, where, as the case may be, a *venire de novo* is awarded, or the former judgment re-pronounced, or modified, as directed by this Court. The defendant is not before this Court at all, but remains below, and a transcript only is sent here; and our decision upon that is remitted to the Superior Court, for further proceedings there in conformity to it. It is clear, therefore, that this Court may say, not only that a wrong judgment was before given, but what would have been the right one, and that the Superior Court is to proceed accordingly. The power of this Court in prescribing the judgment is, indeed, necessarily subject to the limitation, that, where the punishment is discretionary, the kind only can be prescribed, leaving the measure to the Judge on the Circuit. Such has been the course since the Court was constituted, we believe. The cases of *Kearney*, 1 Hawks. 53; of *Yeates*, 4 Hawks. 187; and of *Seaborn*, 4 Dev. 305 are examples of it; and there have been many others.

The Court therefore holds, that the judgment of death must be reversed, and the case remitted to the Superior Court with directions to proceed to pass sentence on the prisoner, upon the conviction, of fine or imprisonment or both, at the discretion of the Superior Court, and also to give judgment against him for the costs of the prosecution.

PER CURIAM. Ordered accordingly.

THE STATE vs. HENRY, A SLAVE.

There cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry of the trespasser be immediate or in so short a time, that the owner or his family has not the opportunity of refastening his door.

As where the owner by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house, without breaking any part, but through the unfastened door, with intent to commit a felony, *Held*, that this was not burglary.

RUFFIN, C. J., dissented.

Appeal from the Superior Court of Law of Robeson County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

The prisoner is indicted in this case for burglary, in entering the dwelling house of James McNatt, on a certain night in January, 1849. The said McNatt and his wife were the only witnesses examined for the State, as to the breaking, entering, robbery, and hour of the night. McNatt stated, that, about four o'clock in the morning, he was awoke by the noise of some one not far from his house, as though in distress: that he got up and removed the chair, with which the front door was fastened, and opened it; and heard from the same direction some one say something about fire: that he did not understand what was meant, and he advanced some seventy-five yards towards the person, who made the noise, and asked, "what do you say," and the reply was, "Jimmy McNatt your mother's plantation is on fire:" that he immediately returned to the house, ordered his horse, put on his clothes,

and started to his mother's, distant two miles, and ordered his servants to follow him as fast as possible: that he left no one at home, except his wife, child, and a small servant girl: that he went as fast as he could, it being very dark when he started: that he passed near the place, from whence the noise issued, but saw no one: that when he got to his mother's, he found the family asleep: that there was no fire about the plantation, and had been no alarm about any: that in conversing with his mother, after he woke her up, they concluded, that he might have been mistaken, and that the fire was at one Lancaster's, a near neighbor: that he went by Lancaster's, and found there had been no fire there, nor did he know of any fire happening in the neighborhood that night: that he returned home a little after day light. Stated also, that his neighbors, and some of their negroes, were in the habit of calling him Jimmy McNatt. Stated also, that he had no money about his house: that he had sent off a raft of timber some time before by his brother, who had returned, but had not accounted with him. He testified as to the tin trunk, pocket book, and note on Gillis, as described in the bill of indictment; and that they were his property: that he had them in possession and saw them immediately before the transaction, but had never seen them since. On his cross examination he stated, that it was his constant habit to fasten his front door, or cause it to be done, with a chair, by putting it against the bottom of the door with the feet fixed in a crack in the floor, and the back door by a pin and a hole in the door post: that he found the front door so fastened, when he got up, and he believed the back door was also.

Mrs. McNatt stated, that her child became sick some time before day on the morning of the occurrence: that she directed a little servant girl, who slept in the house, to get up and make a light: that she got up herself with the child, and heard a noise not far from the house, but could

not understand what was said: that she opened the door to ascertain and heard something about fire: that she called to her husband, and told him of it: that he got up and went to the door: that he went out, came back, gave the orders he deposed to: that he and the servants went off, leaving no one with her, except the little negro girl. She stated, that she opened the front door by removing the chair, with which it was fastened, to ascertain more about the noise she had just heard: that it was their constant habit so to fasten the front door, as it was to fasten the back door by a pin stuck in the post of the door, and she believed the back door was so fastened. And she further stated, that, after her husband left, she pushed to the front door, but did not fasten it, and in the space of ten or fifteen minutes after he left, a negro opened the door, put in his head, and muttered something, and she asked, "who is there;" he then came in and said, have you any money here, and she said, no, there is none here: that she became very much alarmed: that the negro again spoke and said, "haven't you got some money here; if you don't give it to me I will kill you:" that she called on her Maker, and asked, "what shall I do;" and then said to the negro, "if I give you my husband's tin trunk, that contains his pocket book and all his papers, will you spare me?" and the negro said, "may be so:" that she took the tin trunk out of the chest and put it on the table, and he took it off; and that she had never seen the trunk nor its contents since. She stated, that, some short time after the negro left, she started towards her mother's house with her child and the servant girl, and it was then dark: that the occurrence happened on Saturday morning before day. And she also stated, that the prisoner was brought before her some time after this, and she knew him, and she swore to his identity on the trial.

One White was called by the State, and he testified, that, the Tuesday night before this transaction, he heard

the prisoner and one Barlow, a white man, in conversation: That the said Barlow said to the prisoner, "you must break open Jimmy McNatt's house and get his money," to which the prisoner made no reply: That the prisoner told Barlow to let him have two gallons of whiskey: That Barlow let him have them, and thereupon Barlow said, "if you don't do what you promised, I will kill you."

It was contended for the prisoner, that there was no such breaking as would constitute a burglary, supposing the doors to have been fastened: and that, if the prisoner entered with the intent to steal money, he could not be convicted under the bill of indictment, as it charged a robbery of goods and chattels. And further, that there was no evidence, that the prisoner was the person, who made the outcry.

The Court charged, that if the prisoner made the outcry deposed to, for the purpose of decoying McNatt out of the house, and told a falsehood about the plantation being on fire to decoy him off, with the intent to enable him to enter and steal and rob, and he entered the house at the time deposed to and committed the robbery deposed to, it would be such a fraudulent and constructive breaking, as would constitute a burglary, if the door were fastened as stated by the witnesses. And the Court further charged, that, though the prisoner entered the house of McNatt with the intent to steal the money, yet if he committed a robbery as to the articles charged in the bill of indictment, it was well supported.

A new trial was moved for, because there was no evidence that the prisoner was the person, who made the outcry, and because of misdirection on the part of the Cout, as to what constituted a constructive burglary; and also because of misdirection as to the last point raised. A new trial was refused.

Judgment pronounced and the defendant appealed.

Attorney General, for the State.

Strange, for the defendant.

PEARSON, J. We concur with his Honor, that there was evidence to be left to the jury, (and we think strong evidence,) that the prisoner was the person, who made the outcry and gave the false alarm of "fire." We also concur with him, that there was evidence to be left to the jury, of the felonious intent, charged in that indictment.

But as to that part of the charge, which refers to the burglarious breaking, there is a difference of opinion between the members of this Court; and I proceed to give my own opinion.

The prisoner's counsel moved the Court to charge, "that there was no such breaking, as would constitute a burglary."

The Court charged, "that, if the prisoner made the outcry for the purpose of decoying Mr. McNatt out of the house, and told a falsehood about the plantation being on fire to decoy him off, with the intent to enable him to enter, to steal and rob, and he entered the house at the time deposed to, and committed the robbery, it would be such a fraudulent and constructive breaking, as would constitute a burglary."

I am not willing to extend the doctrine of *constructive breaking* further than the decisions have already carried it. In my opinion, the charge of his Honor goes beyond any of the cases, cited in the argument, and any that I have met with.

Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads.

1st. When entrance is obtained by threats, as if the felon threatens to set fire to the house, unless the door is opened.

2nd. When, in consequence of violence commenced or threatened, in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters.

3rd. When entrance is obtained by procuring the servants or some inmate, to remove the fastening.

4th. When some process of law is fraudulently resorted to, for the purpose of obtaining an entrance.

5th. When some trick is resorted to, to induce the owner to remove the fastening and open the door, and the felon enters, as, if one knock at the door, under pretence of business, or counterfeits the voice of a friend, and, the door being opened, enters.

In all these cases, although there is no *actual breaking*, there is a breaking in law or by construction; "for, the law will not endure to have its justice defrauded by such evasions." In all other cases, when no fraud or conspiracy is made use of, or violence commenced or threatened, *in order to obtain an entrance*, there must be an actual breach of some part of the house. 2 *East.* 484, 489.

A sixth class is added by statute 12th Anne, when one, being in a house, conceals himself, and at night rifles the house, and *breaks out*.

Two remarks may be made upon all the adjudged cases of constructive breaking.

There is no case, when the *entry* was not made *immediately* after the fastening was removed, or so soon thereafter, as not to allow a reasonable time for shutting the door and replacing the fastening.

There is no case, when the artifice resorted to, was not *apparently* and *expressly* for the purpose of getting the fastening removed; whereby to gain admittance without breaking it, and so "defraud the law of its justice by an *evasion*.

In this case, the entry was not *immediate*. Fifteen minutes expired, during which there was ample opportunity,

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to replace the fastening. It was gross neglect not to fasten the door, and put the dwelling under the protection of the law, so far as the fastening was concerned. This highly penal law was not intended for the protection of those, who neglect to fasten.

Upon this ground, I think the charge was wrong. If a felon actually breaks, as by boring through and removing the fastening, on one night, and enters the next night, it is burglary; but, if the owner finds it out, and leaves it so, even although it be for the purpose of apprehending the felon, it would not be burglary, for the fastening was not relied upon.

I also think the charge was wrong upon the other ground. If one, intending to go at night and rob a house, tell the owner during the preceding day, that some friend at a distance, say twenty miles, wishes to see him on urgent business, and, by this false word, induces him to leave home; and goes at night, finds the door unfastened, enters and steals, it is not burglary; because it was the neglect of the owner, not to fasten his house, and because it could not be supposed to have been the *purpose* of the felon, to *procure* the *door* to be *left unfastened*, as well as to get the owner out of the way.

In this case, the apparent purpose was to induce McNatt to leave home. It may be, that the purpose also was to have the door unfastened, at the time it was the design of the prisoner to enter, but this latter was not the apparent purpose and was a remote and contingent circumstance, and, in all probability, was not calculated upon; for, it was reasonable to suppose, after McNatt left home at night, his wife would in common prudence secure the door. At all events, whether this latter purpose was entertained by the prisoner, as well as the apparent purpose of inducing McNatt to leave home, was a matter of doubt.

As the interval between the time of the artifice and the entry increases, the probability, that this double purpose

existed, diminishes. Here the interval was fifteen minutes, and it certainly was necessary for the jury to find, that there was this double purpose, to justify a conviction.

I admit the omission to charge in a particular way, or to draw the attention of the jury to a particular distinction, is not error, unless it is suggested, and the Judge is requested so to charge. But it is error to lay down a proposition, which is not true and is calculated to mislead, by inducing the jury to return a verdict without passing upon a material fact.

The charge is, if the outcry was made to decoy McNatt out of the house and the falsehood was told to *decoy him off*, with the intent to enable the prisoner to enter, it was a constructive breaking. What is the meaning of this? How was the prisoner to be enabled to enter? Obviously, by getting McNatt out of the house, and decoying him off, so that an entry could be made in his absence and without opposition by him. This is the only fact, to which the jury were called upon to respond. The proposition does not involve the further fact, that the intention *was also* to enable the prisoner to enter, by having the door left unfastened, at the time he designed to make the entry; and, therefore, the proposition is not true in point of law. In other words, the jury were only to find the single intent, of being able to enter by getting McNatt off, and not the double intent, of being able to enter by getting him off, and also having the door left unfastened; which latter fact is material to a conviction; admitting, for the sake of argument, that the entry need not be made immediately, or so soon after the door is opened, as not to allow time to replace the fastening, as insisted upon in the ground first taken.

I think the judgment should be reversed and a *venire de novo* awarded.

NASH, J. Burglary is defined to be a breaking and entering the dwelling house of another, in the night time, with intent to commit a felony. To constitute the offence, the breaking and entering must combine. The common law has, in all times, regarded with peculiar tenderness the dwelling houses of the citizens; and Judges, to carry out what was considered the intention of the law, have in their adjudications of what shall be a breaking and an entry, resorted to a system of refinement, which, in my opinion, is too regardless of human life. The struggle seems to have been, who should be the most ingenious in finding reasons, for bringing cases within the grasp of the law, rather than in finding reasons to temper its severity. The old decisions, as well as many of the modern, will, upon examination, justify the remark. The word break is one of familiar use and meaning—it means to separate by *violence* the parts of any particular substance or thing. To break a house, therefore, would, in common parlance, be to break by violence any part of it. This definition was, at an early period of the history of the law upon the subject, laid aside; and a breaking was adjudged to be any violation of that mode of security, which the occupier had adopted. Thus, not only the picking of a lock, a turning of a key left in it, and thereby unlocking it, but the lifting of a latch or the raising of a window, kept in its place only by its own weight, have all been gravely adjudged to be an *actual* breaking. 1 *Russ.* 2, 4 *Black. Com.* 224. But another species of breaking was invented by the Judges, called *constructive* breaking. It would seem that the lifting of a latch would have been sufficiently constructive. But cases were brought before the Courts, in which the proprietor of the house himself removed the fastening of his door and opened it, and when so opened, the trespasser entered. It was adjudged, that whenever the opening of the door was procured by fraud, threats, or

conspiracy, it was in law a breaking. To complete the crime, however, it was necessary, that the felon should enter the house. In common understanding, to enter a house, is to go into it. But we are told, the law, which is common sense, does not mean such an entry. But, if in his effort to get in, after having so procured the door to be opened, or while it is shut, any portion of his person, or of his limbs, enter, however small the part be, or how small the distance may be, that it has been within the four walls, the burglary, so far as the entering is concerned, is complete.

Thus when thieves came to rob a house, and, having, by threats, induced the owner to open the door, a contest ensued, and in the struggle one of the prisoners discharged a pistol into the house, and, in doing so, his hand was over the threshold, but no other part of his person, "by great advice," it was adjudged burglary. In another case, where in breaking a window, in order to steal something in the house, the prisoner's finger went within the house, it was a sufficient entry to constitute burglary. *Rex* v. *Davis*, Russ. & Rey, 499. This was decided as late as 1823. These cases are referred to, as examples of the triumph of zeal and ingenuity over common sense. In a population, so dense and corrupt as that of England, such refinement and severity may be necessary. It cannot be so here. I am utterly opposed to these constructive burglaries; and whilst I acknowledge the authority of adjudicated cases, and might be constrained even to follow the finger case, I cannot consent to go one step further. While I am not disposed to take one stone from the heap, I am not disposed to add one to it. In my view, the prisoner's case does not come within any decision, which has fallen under my notice. It is admitted, that, if the felon enter through an open door, he is not guilty of burglary; because, say the authorities, he has committed no violence in making his entry. It was the folly or neg-

ligence of the owner to leave his door open or unfastened in any way. In this case, the door of the house was not fastened in the usual way, or in any way, when the prisoner entered. On behalf of the State, it is admitted, that the breaking by the prisoner was not an actual, but a constructive, breaking. The prisoner did unquestionably procure the door to be opened by fraud. To me, however, it appears to be adding another mesh to the net, to hold, that his entry brought him within the scope of the cases that have gone before. The case states, that, upon the noise, made no doubt by the prisoner, the prosecutor opened the outer door of his house, which had been fastened when he went to bed, in the way described in the case. After opening the door, he was induced to advance to a fence about seventy-five yards off, where he was informed, that his mother's plantation was on fire. How long this conversation continued, we are not informed. On receiving the information, he returned to the house, ordered his horse, and dressed himself. He immediately started for his mother's, leaving the outer door open or unfastened. Some ten or fifteen minutes thereafter, the prisoner entered the house through the unfastened door. This, in law, is not a felonious breaking and entry, and amounts only to a trespass. We have seen, that it is an essential ingredient in the construction of the burglary, that the security, ordinarily provided by the owner of the house, shall be violated; and, according to the authorities, it makes no difference how slight that security may be. And if the entry be made through a window, which is left open, or through a door, which is open, or left unfastened, which is the same thing, no burglary can be committed. It is the *negligence* of those, to whom the law extends this extreme protection, that strips them of its guardianship, to the extent of taking the life of a human being. In the prisoner's case, the prosecutor had ample time after returning to the house, to provide for

its security, during his absence; and those of his family, who were left behind, had ample time after his departure, to secure the door in the way it was usually fastened.

To constitute burglary, where there is no actual, but a constructive, breaking, the entry must be simultaneous with the opening of the door, or follow it so immediately as to preclude the owner from the power of shutting or refastening the door before the entry. I can find no case where this was not the fact in a constructive breaking; and it is right it should be so. The penalty is too high to be exacted in favor of him, who will not take the ordinary care to protect himself. The case has been ably put—suppose the prisoner had, at twelve o'clock the preceding day, informed the prosecutor, that at twelve o'clock the succeeding night, his mother's house was to be robbed; and, after night, he had gone to his mother's leaving the door open, and the prisoner had then entered: would that amount to burglary? Suppose in this case, the mother's plantation had been twenty miles off, and the alarm had been given by the prisoner an hour in the night, and the prosecutor had gone to his mother's, leaving the door open, and an hour before day the prisoner had entered—could that have been a burglarious entry? Suppose again, that Mr. McNatt, after having been induced, by the false representation of the prisoner, to open the door, had retired to bed, leaving the door open, and the prisoner had then entered—could that be a burglarious entry? I think it very clear in law it would not in either of the cases supposed. The owner of the house, in each case, would by his negligence have deprived himself of the *high* protection provided for him, and left the crime to be punished as a misdemeanor. In the last case supposed, it surely was as much his duty to close and fasten his outer door, when he retired to rest the second time, as it was when he retired the first time. It may often prove very difficult to ascertain, what time

elapses between the opening of the door, so procured, and the entry of the prisoner; and still more difficult to fix judicially, when entry is simultaneous with the opening. All I can say is, that, if such a length of time elapses between the acts, as to enable the owner to close and secure his door, no attempt being made by the prisoner forcibly to prevent it, the prisoner will not be guilty of a burglarious entry, if the door be open, or not fastened in some way, when he does enter, which is the case here. I do not consider myself as travelling out of the record or the bill of exceptions. In his argument below, which is inserted in his exceptions, the prisoner's counsel insisted, that, admitting the facts to be as the State claimed them to be, in law the prisoner was not guilty of burglary. It was not necessary he should ask from the Court, more specifically, a charge to that effect. I agree with him. My remarks have been entirely confined to the burglarious part of the charge against the prisoner.

I agree with Judge Pearson, that there was error in law in the Judge's charge, and for that error the judgment must be reversed and a *venire de novo* awarded.

Ruffin, C. J. Whether there was a breaking of the house by the prisoner, in the eye of the law, depends on the enquiry, whether by fraud he procured it to be opened, to the intent he might enter, and then, availing himself thereof, he did enter, pursuant to the first intent. For if one, finding a house shut and intending to enter it and steal therefrom, instead of getting it open by directly forcibly breaking it in his own person, effects his purpose of getting it open by a stratagem or trick on the inmates, whereby he is enabled to enter in the same manner as if he had broken the house from without, that is what is called a constructive breaking. Against its being so held, there is no reason whatever. The meaning is, simply, that, by construction of the law, the accused,

virtually and in substance did break the house, of which he effected the opening by such fraudulent contrivances. The definition of burglary cannot mislead us at this day by the use of the term "breaking," since the same law which gives that definition, furnishes us also with a definition of "breaking," as therein used, which includes both the actual and constructive breakings, which are mentioned in the books. In truth, then, the one kind of breaking is, by the common law, just as effectual to constitute burglary as the other; and, therefore, the only question in such cases is, whether there was a breaking of either kind. There is no doubt in this case as to the falsehood and fraud, by which the prisoner contrived to get the house opened. Therefore the remaining question is only, whether, at the time of adopting the artifice, the object of the prisoner was by that means to obtain the entrance, which he so soon effected. As to the actual existence of the intent, the enquiry is purely one of fact, and fell to the jury; and it was properly left to them, if the circumstances, under which the house was opened and the entry made, are such as, in point of law, will allow an intention to enter to be inferred from them. It would seem to be very singular, that it should be held, that such an intention cannot legally be found, when, probably, not one man in ten thousand would have a doubt in his own mind, that the sole object of the prisoner was to rob the house, and to that end to get it open by the artifice, with which he began his operations. The only fact, on which a difficulty is made on the point, is, that there was an interval of ten or fifteen minutes between the opening of the door and the entry of the prisoner. If the prisoner had forced his way in, as soon as McNatt undid the fastenings of the door, it is admitted, that would be a breaking by construction of law. Why? Because the entry was so directly connected with the opening of the house, that it was apparently the purpose of the artifice to get the

house open, and the purpose of getting the house open to gain admittance. But, how far, as a matter of rational inference, is the appearance of those purposes impaired by the lapse of a minute, of two minutes, of five, or fifteen, before the entry be actually made? It seems to me, in no degree whatever; especially, if it be seen, that, during the interval, the owner of the house was kept in the same state of deception, by which he was induced to open the house, and, by it, is prevented from closing it again. At all events, the force of the inference, and of the delay which tends to rebut it, is for the jury to estimate, according to the conduct of the party throughout and all the attendant circumstances. As indicative of the intent, with which the opening of the house was procured, there is no rule of law or reason requiring that the entry should accompany or immediately follow the opening. It is sufficient, as it appears to me, when the felon gets the house open by fraud, that, by means thereof, he also keeps it open until he can conveniently *enter*, and he makes an entry so soon after the original opening as to constitute the whole one transaction, and satisfy the jury, that, from the beginning, that was the purpose of getting the house opened. The law does not mean, that the felon must rush into the house in the present moment of its being opened, so as not to afford the slightest opportunity for the owner or any member of his family to close the door. If it did, the whole doctrine of fraudulent openings would be at an end. Suppose it to be effected by the abuse of process; that the head of the family is required by an officer to surrender upon a warrant for a felony, and he opens the door, comes out, and places himself in custody; five minutes are spent in the yard in putting the man in irons, and no one of the party enters until the proprietor is bound and secured; but, as soon as that is done, they proceed to rifle the house. Surely that is not the less burglary, because the man of the house did not call to the inmates,

as he came out, to shut the door behind him, or because anxiety for him brought his wife and children into the yard, making them forget to secure the house from robbers, by locking the door against a company, pretending to act as the officers of the law, and therefore *prima facie* entitled to confidence. So, if the entry be by conspiracy with an inmate, upon an agreement, that the house shall be opened, and the entry made, at midnight. The man on the inside is punctual to his engagement, but the burglars find that people are still up in the house or neighborhood, and for that reason do not enter then, but do, when things get quiet, an hour afterwards, and commit the robbery. That is not the less burglary, because the owner might have closed the door in the interval. For, he could not be expected to do so, being asleep in bed; and for that reason the law will not deprive his habitation of its protection. If, indeed, the owner in the interval find his door open, and he will not close it, and the felons enter afterwards, that would be a different case; because the omission is not occasioned by the contrivance of the thief, but is the owner's own fault. But when the owner is in no fault, and the entry is ultimately made by means of the opening obtained through the perfidy of the servant, it is in reason the same thing, whether the entry and the opening be absolutely contemporaneous, or the former succeed the latter so soon as to show, that it was its intended consequence. If, too, the opening be by the owner and obtained by artifice, and the owner leave the house open, and, after he have reason to suspect a trick, a subsequent entry would not amount to a breaking. But if the first contrivance, by which the man was led to open his house, still operate to prevent him from closing it, and it was the intent that it should so operate, and an entry be made within a period, which furnished no suspicion of the fraud, it is certainly competent to conclude, and fair, that the entry was the object from the beginning, and

therefore, that there was a breaking. If not, fraud is purged by its contrivance, and a deceived man is regarded as a negligent one, when the deception is such as would impose on the most wary. A man, for example, calls at another's gate in the country at midnight, and asks for lodgings as an acquaintance, or as a traveller, who has lost way. The householder, willing to admit one in distress, goes for a servant to take the man's horse, and at that hour it takes ten minutes to get up a servant, and when the host gets back, he finds his pretended guest has plundered his house and gone. In such a case, no human prudence would have suggested the necessity for locking the door, in order, during the party's absence on the errand, to keep out the man, whom he is about to admit to the hospitalities of his house upon the plea of distress, which turns out to be false. Or, suppose in that case, that upon the housekeeper's getting to the gate, the stranger falls on him and they make out-cries, which alarm the family, and they, instead of closing the door, run out to afford assistance to the man who is down, and while they are engaged in examining his wounds, the felon avail himself of the opportunity of entering: is it not fit, that the jury should consider, whether this conduct of the robber was not designed from the first to bring about just the events by which he was able to enter and steal, although the transaction from first to last may have consumed five or fifty minutes or more? Here, the prisoner fraudulently procured the door to be opened, and then falsely affirmed that the plantation of the prosecutor's mother was on fire; and he gave the information, at such a distance and such a direction, as was calculated to warrant the belief, that the informer was hurrying to the fire, whereas he was skulking in the dark, and on the watch to make entry at advantage. How can it be supposed, when he entered as soon as he thought it safe, that such was not his object at first and all along? It is said,

it ought to be inferred, because the prisoner could not know, that McNatt would go off and leave his house open, or that his wife would not shut it. Admit that he did not know it; yet he might hope for it, and be willing to take the chances for it, with the intention, should those things so happen, as they did, to avail himself of them, as he did. It was not the fault of McNatt or his family, under the fraud practised on them, not to shut and bar the door against a man, who, as he taught them to think, had gone to another place, and from whom they could have expected nothing but offices of good will. At all events, it was proper for the jury; and they have found the intention expressly, as I conceive. It is true, the presiding Judge did not put it to the jury in the identical words, that they should enquire, whether the prisoner made the outcry for the purpose of getting the house opened, with the intent that he might enter. But he did substantially: and it would seem impossible that the jury could have understood the instruction otherwise. The language used to the jury was, that, if the prisoner made the out-cry for the purpose of decoying McNatt out of the house, with the intent &c, and he did enter as stated in the evidence, it would be a breaking for the purpose of this offence. As McNatt was in the house, and it was fastened inside, could the jury understand, that he was to come out of the house in any other way than by opening the house? It was, indeed, added as a further enquiry for the jury, whether the prisoner "decoyed off" McNatt with the same intent: which, perhaps, was unnecessary and had better have been omitted, as an irrelevant matter. But whether it be or not, can make no difference: for it could work no prejudice to the prisoner, but might have been to his advantage, as the jury, under the instructions, must have thought, that it was necessary they should find the prisoner did both of those acts as indicative of the intent, and therefore would acquit him, unless satisfied as to both. But the

jury has found the prisoner guilty and therefore the intendment is, that they did find both of the acts to have been with the intent supposed; and if both be, then each is, and the real point of enquiry is answered.

For these reasons, my opinion is that the judgment should be affirmed.

PER CURIAM. Ordered that the opinion of the majority of the Court be certified to the Court below, that they may act accordingly.

SARAH ROSS *vs.* ALPHA SWARINGER & AL.

Where a lease is made, the rent to be paid in a part of the crop, the contract is executory, and the title to the crop made is in the lessee, until the lessor's part is separated and allotted to him, and, therefore, before that time, the lessor has no right to take possession of any part of the crop, without the consent of the lessee.

The case of *Deaver* v. *Rice*, 4 Dev. & Bat. 431, cited and approved.

Appeal from the Superior Court of Law of Stanly County, at the September Term 1848, his Honor Judge PEARSON presiding.

In the Fall of 1845, the intestate of the plaintiff, and the defendant agreed, as follows: The defendant leased to the intestate a tract of land for the year 1846, and was to find two horses, and food for them. He was also to supply the intestate with provisions for himself and family during crop time. The intestate agreed, that the whole crop should be the property of the defendant—one half, he was to keep for the rent of the land and the use of the

horses—the other half he was to keep, until he was paid for the provisions and an old judgment, and deliver to the intestate what was left.

The intestate entered and made a crop of corn, but died in the Fall before it was gathered. The plaintiff, who was the widow of the intestate, gathered the crop. The defendant, although forbid by the plaintiff, took off most of the corn. The plaintiff then administered, and brought this action.

The Court charged, "that the crop belonged to the intestate, as incident to his lease, and although, at the time of the lease, in consideration of the lease and the horses and provisions, which were to be furnished, and the old judgment, the intestate agreed, that the whole crop should be the property of the defendant, still the title to the crop did not pass. The crop was a thing not in *esse*, and the contract was not executed and could not be, from the nature of the subject matter. It was *executory*—gave a right of action for a breach, but did not confer a right to take the corn against the will of the owner."

There was a verdict for the plaintiff, and from the judgment thereon, the defendant appealed.

Iredell, for the plaintiff.

Strange, for the defendant.

Pearson, J. It is not necessary to decide the broad question, upon which the case is put, in the Court below, about which there is some diversity of opinion; for the case is clearly with the plaintiff, and the conclusion, to which the Court below arrived, that the contract was *executory*, and not *executed*, is sustained upon special grounds, which do not involve the general question.

First: The contract on the part of the defendant was executory, as to furnishing the two horses and food and the provisions during crop time.

Second: The contract on the part of the intestate, as to the payment of the rent, was executory from the very nature of rent. For, in speaking of rents, Lord COKE says: "the lessor cannot reserve parcel of the annual profits, as the vesture or herbage of the land, or the *like*; for that would be repugnant to the grant. *Co. Lit.* 142." It would be an *exception* of a part of the thing already granted and inconsistent with the grant. Therefore, such contracts, as the present, are necessarily construed, neither as exceptions or reservations, but as covenants or agreements of the lessee to give, *as rent*, as many bushels of corn, as the half of the crop may amount to, or deliver, *as rent*, the one half of the corn that may be made on the land. It is simply a payment of rent, agreed to be made in corn, instead of money; but it does not change the property in the crop, while growing or when gathered, until it is delivered to the lessor. *Deaver* v. *Rice*, 4 Dev. & Bat. 431. It is like the case of an overseer, whose wages are to be paid in a share of the crop. He has no right to the thing itself. The property is in the employer, until a division and delivery.

It is clear for these reasons, that the contract, as to the rent, is executory, and being entire, and executory as to a part, it is necessarily so, as to the whole.

I think the judgment below should be affirmed.

NASH, J. This is an action of trover to recover damages for the conversion of a quantity of corn. The case is: the defendant by parol leased to the plaintiff for one year a parcel of land. It was agreed, the defendant should furnish two horses to work in the crop, and their necessary food; and the defendant, for the rent, was to let him have one half of the corn raised, and to pay him out of the residue, claims, which he (the defendant) had against him. After the crop was raised and housed, the defen-

dant, against the will of the plaintiff, hauled it away, or the largest portion of it.

His Honor instructed the jury, "that, if the intestate had leased the land for a year, the crop belonged to him as an incident of his lease." We do not deem it necessary to notice the subsequent part of the charge in connection with this part; because we believe, that, whether the reason given was or was not correct, the judgment must be affirmed. The case of *Deaver* v. *Rice, Adm'r, &c.*, 4 Dev. & Batt. 431, is decisive of the question. It was there decided, that where, in a lease, either by parol or in writing, the rent is reserved to be paid in kind or in a part of the crop, the lessor has no lien on the crop, when raised, and, until a portion be set aside and apart to the lessor, the whole belongs to the lessee. In this case, the title to the crop of corn was in the intestate, and "the defendant" (in the language of the Court) "had no right to take the corn, against the will of the owner." His so taking it was a conversion, and gave the plaintiff a right to maintain the action. If, after the crop was made, the lessee had refused to allot to the defendant his share, the latter could have maintained an action on the case for the violation of the contract.

In the course of the investigation of the case in this Court, it was urged, that the contract between the parties, as it respected the corn, was for an interest in the land, and, therefore, void under the Statute of frauds. *Rev. St. ch* 50, *sec.* 8. We do not think so. The agreement on the part of the defendant to receive his rent in a part of the crop, did not constitute an agreement on his part for any interest in the land during the lease, and, if, by any casualty, no crop was raised, he could have derived no benefit from his contract. This principle is decided in *Evans* v. *Roberts*, 5 Bar & Cr. 829. There the question was, whether the verbal sale of a then growing crop of potatoes was a contract or sale of land, or any interest in

or concerning them, within the 4th section of the Statute 29th, of CHARLES 2nd. The Court say it is not, but that it is a contract for the sale and delivery of things, which at the time of delivery would be goods and chattels. That was a much stronger case than this. The lease in this case was for one year, and although by parol, was good and valid. The rent being reserved in kind, that is, a part of the crop, the title to the whole crop when made was in the intestate Ross. It was contended by the defendant, that under the contract he was entitled to one half of the crop raised to pay his claims, as it was mortgaged to him for that purpose. The answer is, that the property, the corn, was not in such a situation, that it could be mortgaged. The plaintiff was entitled to maintain her action.

PER CURIAM. Judgment affirmed.

THE STATE vs. ALLEN HOWELL.

Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued with his arm uplifted, and when he reached his opponent, stabbed and killed him, the latter having stopped and first struck with his fist; *Held*, that this was a clear case of murder.

Appeal from the Superior Court of Law of Granville County, at the Spring Term 1849, his Honor Judge DICK presiding.

The prisoner is indicted for the murder of one Henderson Floyd. The case is, the prisoner and the deceased,

both men of color, lived with their families in the same house. A quarrel took place between them, the deceased being in the house and the prisoner in the yard. The prisoner threatened to go into the house and whip the deceased, and started off to do so, when he was stopped by the persons present. After a short period, the deceased came out and walked off in a different direction from where the prisoner stood, and observed to him, if he wanted the house he could take it. The deceased continued to walk off and had gotten about fifty yards, when the prisoner swore he would whip him any how, and started after him. The house intervened between the witness and the parties, and when he came in sight of them, the deceased was standing still, and prisoner approaching him, with his arm raised in a striking position. As soon as he came within striking distance, the deceased struck the prisoner, who immediately returned the blow, and the deceased fell and died in a short time The witness interfered and saw a knife in the hand he struck with. The deceased had a deep wound in the breast and died in a few minutes. The knife was a double bladed one, one of the blades being small and the other large, being about three inches long, and with this blade the wound was inflicted.

His Honor instructed the jury that the knife used was a deadly weapon, and if they were satisfied from the evidence, that the prisoner opened it, when he started after the deceased, with the intention of using it on him, and did use it in the manner described by the witness, and thereby slew the deceased, he was guilty of murder.

The jury found the prisoner guilty of murder; a motion for a new trial was made, because of error in law in the charge of the presiding Judge, which being refused and judgment pronounced, he appealed to the Supreme Court.

Attorney General, for the State.
No counsel in this Court for the defendant.

NASH, J. This case is relieved from all doubt and uncertainty. The facts are few and simple, furnishing a full and complete instance, in themselves, of that malice, which is essential to constitute a case of murder; of that *mala mens*, a mind regardless of the obligations of social duty and fatally bent on mischief. The parties lived in the same house. A quarrel, slight in its character, took place between them—the deceased, apparently with a wish to avoid a collison, left the house and the premises, was pursued by the prisoner, overtaken at the distance of fifty steps, and immediately stabbed. It is true that the deceased struck the first blow, but this does not mitigate the offence of the prisoner. In every stage of the transaction he was the assailant. When he approached the deceased, his arm was raised in the attitude to strike, and with a deadly weapon. The law did not require the deceased to wait until the prisoner had executed his threat, but justified him in anticipating the premeditated assault. There can not be a doubt but that the crime of the prisoner is that of murder. We have examined the record and perceive no error in it or in the charge.

PER CURIAM. Ordered to be certified accordingly.

THE STATE *vs.* THOMAS LONG.

One, who appears at Court to answer the charge of being the father of a child about to be born a bastard, may, before an issue is made up, move to quash the proceedings, on the ground that the mother is a woman of color within the fourth degree.

If, upon such motion, the proceedings are quashed by the Court, a subsequent warrant, charging the same person with being the father, issued afte the birth of the child, cannot be supported.

The proper relief against the order to quash, if it was deemed erroneous, was by appeal or *certiorari*.

The cases of the *State* v. *Ledbetter*, 4 Ire. 242, and *State* v. *Patton*, 5 Ire. 180, cited and approved.

Appeal from the Superior Court of Law of Martin County, at the Spring Term 1849, his Honor Judge SETTLE presiding.

This was a proceeding under the bastardy Act. In May, 1848, a single woman, Lucinda Simpson, made oath before two magistrates, that the child, of which she was then pregnant, was begotten by the defendant, Thomas Long. The magistrates issued a warrant against Long, and bound him to appear at the next Term of the County Court, which was in July. The recognizance, together with the examination, was duly returned. The defendant, at the Term of the Court, to which he was bound, and before the birth of the child, moved the Court to dismiss the proceedings, for the reason that Lucinda Simpson was a woman of mixed blood, within the fourth degree, and therefore incompetent to give testimony against a white man. The Court heard the testimony offered, and, being satisfied that Lucinda Simpson was a person of mixed blood and within the fourth degree, so adjudged and quashed the proceedings. Subsequently, in October,

1848, on the oath of Lucinda Simpson, another warrant was issued by two magistrates against Thomas Long, as the reputed father of the same child, and the proceedings duly returned to the County Court. These proceedings were, on the motion of the defendant, Long, dismissed by the Court, upon the ground, that the competency of Lucinda Simpson to give evidence in the case, had been conclusively adjudicated in favor of the defendant in the preceding case. Upon appeal to the Superior Court, the judgment of the County Court was affirmed. From this judgment the State appealed.

Attorney General, for the State.

Biggs, for the defendant.

NASH, J. There is no one principle of law better established or more universally recognized by the profession, than that a matter, once judicially determined by a tribunal of competent jurisdiction, is binding between those, who are parties or privies to it, while it remains unreversed. Between them its absolute verity cannot be collaterally impeached. The case we are considering is, as to the question now before us, controlled and governed by it. The County Court of Martin, at its July Term, was fully competent to decide the question before it. It is not necessary we should decide, whether the magistrates, who bound the defendant over to Court, could at that time hear any reasons or testimony on the part of the defendant, why he should not enter into the recognizance required in such cases, or whether it was the duty of the defendant then to bring forward his defence. It is sufficient, that he availed himself of the first opportunity given him, before the tribunal, which alone could try the issue of his actual guilt, to make the objection. Nor is it any objection, that the proceedings were dismissed on the motion of the defendant before the child was born. It

was open to him to submit a motion to quash at any time before issue joined, and it was competent to the Court to hear it. The defendant came before the Court, we think, in apt time and in apt order. It is not denied, that this is a defect, upon which the accused may insist, at some time and in some form. If known to the magistrates, at the time they were called on to take the examination of Lucinda Simpson, they might and ought to have rejected her evidence; and, when brought into the County Court, the defendant was at liberty to take the exception, at any time before he claimed the issue, provided for him by law. *State* v. *Ledbetter*, 4 Ire. 242. *State* v. *Patton*, 5 Ire. 180. The motion to quash, made at July Term upon the first proceedings, was one, which the Court had full power to hear and try; and they, having adjudicated, both upon the law and the evidence, as they were necessarily bound to do, their judgment, while it stands unreversed, is binding upon the parties, and the proceedings were rightfully quashed in the Superior Court. The question, as to the competency of Lucinda Simpson to give evidence against the defendant, is one not open upon the present proceedings. Instead of instituting the second proceedings, the first case might have been brought up by an appeal or by a writ of *certiorari*. *Ledbetter's case*, 4 Ire. 242.

PER CURIAM. Judgment affirmed.

DOE ON DEMISE OF REBECCA CRUMP vs. JOSEPH H. THOMPSON.

A declaration in a deed, that the land, conveyed by it, had been before granted to a certain person, is not evidence for the parties to the deed, that in fact it was thus granted.

In cases of adverse possession of land, the statute of limitations begins to run from the ouster. If the one having the right be a *feme covert*, and the seven years have expired in the lifetime of her husband, she has three years, and only three, after the death of her husband, within which to commence her suit: when the seven years have not expired in the lifetime of her husband, the two periods of seven years from the ouster, and three years from the death of the husband are concurrent, until one of them shall have run out; and then the *feme* is entitled to the other and longer period, to enter or sue.

Appeal from the Superior Court of Law of Davidson County, at the Spring Term 1849, his Honor Judge Dick presiding.

The action was commenced on the 16th of August 1845. The plaintiff gave in evidence a grant for the premises to Thomas Monroe, dated on the 27th of November 1792, and that he died many years ago, and that the lessor of the plaintiff was his only child and heir at law, and intermarried with Mark Crump.

The defendant gave in evidence a Patent to one Henry Dolin, dated in 1752, for a large tract of land, and a deed from Dolin to Edward Williams for the same land, and a deed from Williams to Richmond Pearson for certain lands, therein described by metes and bounds, and dated in 1791. The defendant gave no direct evidence to show, what land the said patent and deed covered or that they included any part of the premises in dispute. But the defendant gave in evidence a deed from the said Pearson

to one Nathaniel Peebles, dated in 1817, conveying a certain tract of land in fee, which is therein described by metes and bounds and also as being part of a tract of land conveyed by Edward Williams to the said Pearson in the year 1791; and the defendant then gave evidence, that the deed to Peebles covered that part of the land, claimed by the plaintiff, of which the defendant was in possession, and that he, the defendant, entered and claimed under the said Peebles.

Thereupon, the counsel for the defendant moved the Court to instruct the jury, that the recital in the deed from Pearson to Peebles was sufficient evidence to satisfy the jury, that the patent to Dolin covered the premises in dispute. The Court refused to give the instruction.

The defendant then offered evidence, that in the year 1837 or 1838, the land conveyed by Pearson to Nathaniel Peebles was divided between his heirs: and that the part thereof, which is covered by the grant to Monroe, was allotted to Hubbard Peebles, one of the heirs, under whom the defendant claims; that Mark Crump, then the husband of the lessor of the plaintiff, was present at the time, and objected to the allotment thereof, but that, nevertheless, the said Hubbard took the possession of the land in dispute immediately, and he and those claiming under him have continued in possession ever since. The defendant further gave evidence, that Mark Crump died in November 1838, after the said Hubbard had taken possession.

The counsel for the defendant thereupon prayed the Court to instruct the jury, that, if they should believe that Hubbard Peebles and those claiming under him had seven years continued possession of the premises, before the commencement of this suit, the lessor of the plaintiff's right of entry was barred by the statute of the limitations. But the Court refused to give the instruction, and, on the contrary, directed the jury, that, although the defend-

ant's possession might have begun in 1837, yet the statute of limitations did not bar, because the lessor of the plaintiff had seven years from the death of her husband in November 1838, in which to enter or bring suit; and that it was immaterial to this purpose, whether the possession of the defendant was under or in opposition to Mark Crump.

Verdict and judgment for the plaintiff, and the defendant appealed.

No counsel for the plaintiff.

J. T. Morehead, for the defendant.

Ruffin, C. J. The Court concurs with his Honor on the first point. One object of the defendant was to show the better paper title to be out of the lessor of the plaintiff, by virtue of a grant for the same land, prior to that of Monroe. But the only evidence he gave, that the two tracts, or parts of them, were identical, was, that Pearson's deed to Peebles, after describing the land by corners, metes, and bounds, goes on to say, that the land was part of a tract one Williams conveyed to Pearson. But there is no warrant of authority or reason for the position, that a recital or description in a deed proves its own truth in favor of the party himself. Upon a question of boundary, it might perhaps be evidence, with other things, of the locality of a line of the patent, that the parties to an ancient deed therein called a particular line that of the patent. But, of itself, a declaration in a deed, that the land, conveyed by it, had been before granted to a certain person, is not evidence for the parties to the deed, that in fact it was thus granted.

On the point of the statute of limitations, however, the Court holds the opinion given to the jury to be wrong. It assumes, that the defendant's possession may have begun in 1837, or so early in 1838, as to have continued for more

than seven years before suit brought, and that it may have been adverse to Crump and wife at the beginning, yet it concludes, that the Statute did not bar, because the wife has seven years from the death of the husband to enter. But that is clearly erroneous—being in direct contradiction to the words of the act. The Statute runs against all persons, as well *femes covert* as others, making the seven years, next after the right accrued, a bar; with a proviso, however, that a person, who was a *feme covert* when her right first accrued, shall and may, notwithstanding the seven years be expired, commence her suit within three years after discoverture. The language of the act is as plain as it can be. The seven years began to run from the ouster of the owner, when an action arose against the wrong doer. The possession was taken by Peebles adversely to Crump and wife, and there is no doubt the husband might have entered, in right of himself and his wife, or have brought an ejectment. Had seven years expired in Crump's life time, the proviso is explicit that the *feme* should have three years more, and only three, to commence her suit. But when the seven years have not expired in the life of the husband, as was not the case here, the two periods of seven years from the ouster, and three years from the death of the husband, are concurrent, until one of them shall have run out, and then the *feme* is entitled to the other and longer period to enter or sue. She derives no benefit from the proviso, therefore, unless the seven years from the ouster shall have expired, before the three years from her discoverture. It was, consequently, wrong to make the death of the husband the *terminus*, from which the seven years began to run. It is only the three years, which refer to that event; and the seven years never relate to it, but only to the period of the ouster. If, indeed, the defendant had entered under the husband, as upon a conveyance from him purporting to be for the fee, then the lessor of the plaintiff would have had seven years from

the husband's death to bring suit. But that would be, not because the act gives the *feme* seven years from her husband's death to bring suit, but because it gives her seven years from her right of entry and action accrued, and that would not accrue until the husband died; for, the possession of the husband's alienee would be consistent with the estate of the lessor of the plaintiff, until the death of the husband, and it would be upon that event only, that the possession would become adverse to her, so as to entitle her to an action. But here the ouster was in the time of the husband, and the adverse possession continued for more than seven years from the ouster, and also more than three years from the death of the husband. The case, therefore, was within the express words of the enacting clause of the Statute, and not within the saving of the proviso; and the jury ought to have been instructed, that, upon the facts supposed, the statute was a bar.

Per Curiam. Judgment reversed, and *venire de novo*,

THE STATE, TO THE USE OF THE COUNTY TRUSTEE OF BRUNSWICK vs. ROBERT W. WOODSIDE & AL.

Under the private Acts of 1831 and 1835, relating to the County of Brunswick, any three or more justices, sitting in Court, may lay the taxes.

As regards this, the Act of 1835 does not repeal the Act of 1831.

Every affirmative statute is a repeal, by implication, of a prior affirmative statute, so far as it is contrary to it. But the law does not favor these implied revocations, nor are they to be allowed, unless the repugnancy be plain; and where, in the latter act, there is no clause of *non obstante*, it shall, if possible, have such construction, that it shall not operate a repeal.

Although the tax list, made out by the Clerk and delivered to the Sheriff, may be defective, yet the Sheriff who receives it and acts under it cannot make the objection.

It has been the universal practice in this State to permit an Attorney in a cause to give evidence, at the instance of his client.

Where a public officer collects money due to a County, no demand is necessary, before suit brought.

The County Trustee, where there is one, is the proper relator in an action to recover moneys due to the County, except when he is a defaulter or when he refuses to proceed against defaulters. In these cases suits may be brought by the Committees of Finance in the name of the State.

The cases of the *State* v. *Woodside*, 8 Ire. 106, and *State* v. *McIntosh*, present vol. p. 307, cited and approved.

Appeal from the Superior Court of Law of Brunswick County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

This is a suit against the defendants on the sheriff's bond of said Woodside, executed in September 1843, and the breaches assigned are, that he collected and failed to pay over the County taxes, assessed in March 1844, for the year 1843; and that he failed to collect and pay over the said taxes. It appeared from the record, that there were but four magistrates on the bench of the County Court, when the taxes aforesaid were imposed, and it was not alleged or pretended, that the magistrates of

Brunswick had ever been classified, as, by the private Acts of 1831 and 1835, they were directed to be; and it was insisted for the defendants, unless the said magistrates had been so classified, no number short of a majority had the power of County taxation. It was admitted, that some twelve or fifteen magistrates then resided in the County. The relator offered in evidence a document from the County Court Clerk's office, which contained an aggregate valuation of the real estate in Brunswick and the number of black and white polls, which, the Clerk then stated, was the data, on which he made out the tax list for the year in question, and that the list he gave the sheriff contained the *names* and the *amount* collectable out of each tax payer. It was objected to by the defendants, because the Clerk had no right, on such a document, to issue a tax list to the Sheriff: That a document, to sustain a tax list ought to set forth the names of each inhabitant, liable to pay taxes, and the amount, for which he was so liable. It was allowed to be read. D. B. Baker, Esq., the Attorney of record for the relator, was introduced as a witness, for the purpose of proving, that, as County Solicitor for Brunswick, he was directed by the County Court to call on the defendants for a settlement, in relation to the County taxes, and also to prove the admissions made by the defendants, or some of them, as to the collection of the said taxes by the said Woodside. His testimony was objected to, on the ground that an Attorney of record was not a competent witness for his client. The objection was overruled. There was no evidence of record in the County Court, that the relator in this case had ever been appointed County Trustee, and, failing to show this, the plaintiff offered a bond he had executed as such, and also offered to prove, that he acted as such, and had been treated by the defendants, as such, in paying him a portion of the County taxes. This testimony was also objected to, but was received. The tax

lists, taken by the magistrates in 1843, were offered in evidence, to show that the Clerk had authority, or some data to act upon, in making out the tax list delivered to the said Woodside. This testimony was objected to, because they had not been recorded, as directed by law, but they were received. Upon the question, whether a demand had been made on the defendant, Woodside, before suit was brought, D. B. Baker, Esq, stated, that, as solicitor, he called on the defendants for a settlement about the County taxes before suit brought: that some settlement had taken place between the defendants and the Committee of Finance: that he had a paper of some kind in his hands, when he endeavored to effect a settlement, showing, that one had been had with a Committee of Finance. He also stated, that Woodside *admitted*, that he had collected the taxes. And the defendants offered in evidence a receipt signed by the relator, dated June, 1845, as evidence of a payment. The defendants insisted, that this testimony, taken altogether, furnished no evidence that a demand had been made. The Court thought there was evidence of a demand to be left to the jury. The defendants also insisted, that the County Trustee was not the proper person to relate, even if it had been made to appear by the record of the County Court, that he had been appointed. This suit is for the bridge tax. All the objections raised in this case, by consent of the counsel, were reserved by the Court, with liberty to enter a non-suit. And the Court, on consideration, ordered a non-suit to be entered, and the relator appealed to the Supreme Court.

Kelly, for the plaintiff.
Strange, for the defendants.

Nash, J. The action is brought on the official bond of Robert Woodside, who was Sheriff of the County of

Brunswick, and his sureties. The breach assigned is for collecting and not paying over the County taxes assessed for the year 1843. On the trial below, several objections were urged against the plaintiff's right to sustain his action, and being all reserved by the Court, by the consent of the parties, with liberty to enter a non suit, the duty is imposed upon us of considering the whole. We will proceed to do so in the order, in which they stand.

The first objection is, that no tax was legally imposed by the County of Brunswick for the year 1843; because, by the private acts of 1831 and 1835, the magistrates of that County were directed to divide themselves into classes for the purpose of holding the County Courts, which had never been done; therefore, no number less than a majority could lay the tax, and in this case it was admitted, that a majority was not present. This objection was substantially answered by this Court in the case of the *State to the use of Owen against these defendants*, 8 Ired. 106. That action was brought on the official bond of the defendant Robert Woodside and his sureties, to recover the County taxes for the year 1842. The same objection was taken there as here, and being insisted on, as it is now, did not receive that specific answer it ought to have done. It was not, however, overlooked, as is supposed, but was considered to be overruled by the opinion given. It was decided, that, under the 6th section of the act of 1831, ch. 154, three magistrates were competent to hold the Court, and lay the County taxes. It is not stated in so many words in the opinion given, that this might be legally done, although the magistrates had not classed themselves, but was so substantially, for the opinion states, that the magistrates were required to class themselves. The 6th section of the act of 1831 expressly gives to the magistrates, who do attend, the power to do any business that a majority is required to do, which shall be as valid as if done by a majority. We were of opinion then, as we still are,

that, although the magistrates were required to class themselves and had neglected so to do, a *Court* composed of any number was competent to lay the taxes. One design of the act was to remedy an evil, felt and complained of by all who were in the habit of attending the County Courts. It is an old trite saying, that what is every body's business is no body's business. By the general law, it is made the duty of all magistrates to hold the Terms of the County Court, and it is found by experience, that much delay occurs, in many instances, in organizing the Court and in retaining a sufficient number of Justices on the Bench for the transaction of business. It was the object of the act of 1831 to remedy this evil, by causing the magistrates to divide their number into classes, containing five members, whose duty it should be to hold three respective Terms of the Court, and when so classified, that a majority of the acting class should be competent to do and transact all the business, that seven could do. But that they did not intend to confine the power to assess the taxes to the magistrates in their respective classes, is manifest from the fact, that, if that were true, the words quoted from the 6th section would be tautological and unmeaning, as that power was granted to the classified members by the 3rd clause of the act. It is, however, contended, that the act of 1831 is repealed by that of 1835. To a certain extent this is so; wherever it makes provision for the same thing in a different manner, it does repeal the act of 1831. Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it; for the maxim is "*leges posteriores priores abrogant.*" But the law does not favor these implied revocations, nor is it to be allowed, unless the repugnancy be plain, and where, in the latter act, there is no clause of *non obstante*, it shall, *if possible*, have such construction, that it shall not operate a repeal. 6 *Ba. Ab. Stat, letter D. p.* 373. 11 Rep. 63, *Fosters case.*

The statute of 1835 is in *pari materia* with that of 1831, and its provisions must be pursued, when contradictory to the latter. The 4th section is the one relied on, as bearing on this case—as repealing the 6th section of the act of 1831. The first portion of the section we are considering, down to the first proviso, embraces, with an immaterial variation, the 3rd section of the act of 1831. The first proviso *secures to all the other magistrates of the County the right to hold the terms of the County Courts*, which was omitted in the preceding act. The second proviso relates to the taking of the sheriff's bonds, giving to the Justices, who are absent when the bonds are taken, time, until the succeeding term, to require additional sureties on the bonds, if they deem it necessary. So far, then, as that section makes arrangements different from and inconsistent with the provisions of the act of 1831, it is a repeal of it, but no further, as there is no *non obstante* clause in it. But in the 6th section there is an important provision, entirely omitted in the act of 1835, and the latter contains nothing inconsistent with it; I mean the clause, giving to *any three* magistrates, power to do any act, which, by law as it was at the time of the enactment of 1831, was required to be done by a majority of the acting Justices. The latter provision is not repealed by the act of 1835, and the taxes were in this case assessed by a competent Court.

The next objection is to the tax list furnished by the Clerk. The case states that it was made out by the Clerk from a document in his office, which contained an aggregate valuation of the real estate in Brunswick, and the number of black and white polls, with the names and amount to be collected out of each tax payer. If the objection were a sound one, it does not lie in the defendants' mouths to make it. The sheriff received it as the tax list and under it did collect the taxes, mentioned as due on it. Whether the tax list were a full and legal one, or not, is

not important; for, we have decided, in the case of *State* v. *Woodside et al*, that it is the duty of the sheriff to apply to the office and get a list, but it is not necessary for him to have the list when he collects the tax—he cannot, without a proper tax list, enforce a collection, but may receive without it.

The third objection is to the competency of Mr. Baker, the plaintiff's Attorney, to give evidence for him in the case. It appears from the case of *Bundy* v. *Bullett*, 16 Mus. & Willy, 645, N., that such a rule has been adopted by the English Courts. It is to be remembered, that in England there is a material difference between the office of counsellor and that of an Attorney, and that in the case referred to, it was an attorney, whose testimony was offered in evidence. In this State there is no such distinction known—every attorney with us is also a counsellor. Be this as it may, it has been the uniform practice in our Courts to receive such testimony. It is a practice not to be encouraged, and in most cases has, we believe, been accompanied by a surrender, on the part of the attorney, of his brief in the case.

The fourth objection is, that there was no record, showing that the relator ever had been duly appointed County Trustee. From the state of the pleadings this objection is not open to the plaintiff. He has accepted a declaration from the plaintiff, and has not by any plea denied, that the relator was the County Trustee. His pleas are, *non est factum*, payment, and conditions performed. It would be a complete surprise on a plaintiff to suffer this defence to be sprung upon him, under either of these pleas.

The fifth exception is answered in replying to the third.

The sixth objection is, that the plaintiff had not shown any demand. It has been decided in this Court, in the case of *State* v. *McIntosh*, 9 Ire. 307, that where a public officer collects money due to the State, no demand is necessary. It is the duty of the officer to pay it into the

proper office, when collected, and it is a breach of his official duty not to do so. Mr. Baker proved, that the sheriff, Woodside, admitted to him, he had collected the taxes, for which this action is brought.

It was finally objected, that the County Trustee was not the proper person to relate in this case. The case of the *State* v. *McIntosh* is relied upon to show, that, by the general law, the County Trustee cannot be the relator to recover the County revenue. That case is no authority for the position assumed. The portion of the opinion relied on is the answer to the defendant's first exception. The question was, whether, in that action, the County of Moore, or the Chairman of the County Court, was the proper relator. This depended upon the true construction of a private act, passed in the year 1835, for the benefit of the County of Moore. In making this construction, the Court adverted to the peculiar phraseology of the private act, and also to that of the 3rd section of the act of 1777, directing "the County Trustee to sue for, recover and collect," from all persons, all money due his County. In commenting on that section, the Court say: "but no direction is given *in whose name* the suit shall be brought." In the succeeding sentence the meaning of the Court is made manifest. It is in these words, "at the time, then, the private act of 1835 was passed, no law existed *directing* the Trustee, *in so many words*, to sue in his own name." The case is no authority for the objection assumed here.

The judgment below must be reversed and judgment given for the amount rendered by the jury in their verdict.

RUFFIN, C. J. The private act of 1831, ch. 154, first provides, that the Justices of Brunswick shall classify themselves, and then it defines the powers, duties, and responsibilities of the several classes. It then adds, as a

substantive and independent provision, in the sixth section, that, "in *any* case, in which a majority of justices is required and does not attend, those who are present may proceed to take the sheriff's bonds, *and do any other business* that a majority is required to do, which shall be as valid as if done by a majority of the justices." The subsequent private Act of 1835, ch. 43, again directs the justices of that County to arrange themselves in classes, and defines the duties and powers of those classes respectively, or a majority of them. But in no part of it is there any reference to the general provision of the sixth section of the former act, already quoted, whereby any justices present—of course, to the number of three or more—received authority to exercise all the powers of a majority of the justices. Consequently, that general provision remains untouched; and, whether the justices classed themselves or not, any three of them could lay the County tax.

The action is also properly brought upon the relation of the County Trustee, and the character of the particular person, Mr. Owens, as filling that office, is not open to dispute, as it is not put in issue by the pleadings. An analogous case is the familiar one of a suit by an executor, as such, in which he need not produce his letters at the trial, unless *ne unques executor* be pleaded. It results from the provision of the Act of 1777, *Rev. Stat. ch.* 29, *sec.* 4, that the County Trustee may "demand, sue for, and recover," from the sheriffs and all other persons, any money due for the use of the County, that he may bring the suit in his own name, no other form being prescribed. But it is supposed, that the subsequent Act of 1831, *Rev. Stat. ch.* 28, *sec.* 30, alters the former law, because it requires suits for money due the County to be "brought in the name of the State for the use of the County." The two provisions, however, relate to different cases and are clearly compatible, and therefore both may and must stand. The latter provision relates exclusively to suits,

instituted by committees of finance, whose appointment is provided for and powers fixed by the Act of 1831. It is clear, that the committee was not intended to supersede the County Trustee; for one of the duties of the committee is to settle with the County Trustee. Besides, both of the Acts of 1777 and 1831 are retained in the Revised Statutes, and therefore they must be construed, so as to render them consistent, if possible. Now, that may be done, by taking into consideration, that in some Counties the office of Trustee is abolished, and in others it is left to the justices to abolish it; and, therefore, in those cases, the Committee of Finance have to some extent the duties of settling, in his stead, with the receiving and disbursing officers of the County revenue, and, consequently, in some cases may have to institute suits. Indeed, when the County Trustee himself is a defaulter, no one can sue him but the Committee of Finance, until the period of appointing a successor has arrived. And, even if there be a County Trustee, and he will not proceed against a sheriff in arrear, or other receiver, the fair construction of the Act must be, that the Committee of Finance may provide for the security of their County revenue by bringing suit. In any of those cases, the action must, no doubt, be instituted by the committee in the name of the State, for the use of the County; because the Act of 1831 requires it. But, when there is a County Trustee, and, without any interference of the Committee of Finance, or its appearing even that there is one, very clearly it still continues his duty, by force of the 29th Chapter of the Revised Statutes, to sue for the money due the County, in the same manner as he might before the passing of the Act, authorising the appointment of a committee and conferring on it the power of bringing suit. It was upon this distinction that the case of *McIntosh*, 9 Ire. 307, was in truth decided; and, instead of being for the defendants, as insisted, it is directly the other way. By a private

Act, 1835, ch. 78, the office of County Trustee was abolished in Moore, and the duties transferred to the Sheriff; who was required "to perform them under the same rules and regulations and restrictions as are now prescribed by law for the government of the County Trustee;" "and," it is added, "in all cases, where suits are by law directed to be brought in the name of the County Trustee, such suit or suits shall be brought in the name of the Chairman of the County Court." That, manifestly, has in view such suits as the sheriff, in the discharge of the functions of County Trustee thereby conferred on him, should find it necessary to institute; and no others. There was no intention of interfering with the duties and powers of a Committee of Finance to settle with and sue any defaulting officer, and especially the sheriff himself, in the form prescribed in the public Act for the government of that Committee. Well, McIntosh was in default as Sheriff and County Trustee, and a suit was instituted by the Committee of Finance against him and his sureties, and for these reasons the Court was obliged to hold, that it was properly brought in the name of the State, for the use of the County; since the general law expressly required suits, instituted by the Committee, to be thus brought, and the provision in the private Act was not intended to modify that provision of the general law, but only to say how the sheriff should bring the suit, when he found it necessary to bring one as the substitute for the County Trustee. The three provisions are, in truth, all, distinct; for the different statutes or chapters direct the County Trustee to sue in his own name; the Committee of Finance, in the name of the State, for the use of the County; and the Sheriff, in the name of the Chairman of the County Court.

For these reasons, and those stated by my brother NASH on the other points, I concur with him, that there should be judgment for the plaintiff upon the verdict.

PER CURIAM. Judgment reversed and judgment for the plaintiff.

EMILY STAFFORD, ADM'R, &c. *vs.* ALLEN NEWSOM.

Where an action was brought to recover the value of certain horses, alleged to have died from eating corn, mixed with arsenic, which the plaintiff bought from the defendant; *Held*, that if the defendant had fraudulently concealed from the plaintiff the fact, that arsenic was so mixed with the corn, yet the plaintiff could only recover damages to the value of the corn, provided he was informed, before he gave it to his horses, that arsenic had been mixed with it.

It is not sufficient, in an action in the nature of deceit, to prove that the representations of the defendant were *calculated* to deceive, but they must be made with *intent* to deceive.

The case of *Hamrick vs. Hogg*, 1 Dev. 350 cited and approved.

Appeal from the Superior Court of Law of Montgomery County, at the Spring Term 1849, his Honor Judge CALDWELL presiding.

This is an action on the case brought to recover damages, because a certain quantity of corn, bought by the plaintiff of the defendant, was infected with arsenic, whereby the plaintiff lost three horses, which had been fed on said corn.

The declaration contains several counts, but the one mainly relied upon is the count in deceit.

On the trial, it appeared, that the plaintiff went to the house of the defendant, and, after some chaffering, agreed to buy of him six bushels of corn, and the price fixed on was eighty two and a half cents per bushel: that it was kept in boxes in the back room of a store house, and was measured out to the plaintiff and put into his bags. By the testimony of a witness, introduced by the plaintiff, it appeared, that after the price had been agreed on, and after the six bushels had been measured and put into the

bags, the clerk of the defendant observed, that arsenic had been put in two plates of meal in the said back room for the purpose of killing rats; upon which the plaintiff said, that he did not like to take the corn, if it had been exposed to arsenic; that the defendant said, there was no danger, that he had sent a part of the said corn to mill: that he would be responsible for all damages, but that the plaintiff had better not tell his wife of it, as women were timid: that the plaintiff took the corn home, fed it in small quantities to his horses: that they became suddenly sick, and in a short time died. By the testimony of the clerk, who was examined by the defendant, it appeared, that, after the price had been agreed on, and about half the corn had been measured, he remarked, that arsenic had been about: that some had been put in two plates of meal in the said room to kill rats: that the plaintiff said, if that were the case, he did not like to take the corn: that the defendant then remarked, there was no danger, but, if he did not like it, to put it back in the box: that the balance of the corn was then measured and put into bags and taken off by the plaintiff. And the said clerk also testified, that not more than ten grains of arsenic had been put into small plates of meal.

Sundry witnesses were examined in relation to the arsenic and the corn, and how it affected the defendant's hogs, and as to the defendant's knowledge of their being sick, and how and what quantity would affect a horse, and how the horses in question were affected.

The Court charged the jury, to entitle the plaintiff to recover, he must make it appear, that the corn was infected with arsenic; that the defendant knew, and concealed it; and that the plaintiff's horses died, by reason of their eating the said corn. And the Court also charged, that, if the defendant, or his clerk, told the plaintiff, that the corn had been exposed to arsenic, so as to put him on enquiry before the contract was completed, the

plaintiff would not be entitled to recover; but, if such information were given after the property in the corn vested in the plaintiff, it would not avail, and left it to the jury to decide, which of the witnesses was most to be relied on, as to the time the subject of the arsenic was mentioned, and as to other matters, in relation to which they deposed. And the Court further charged, that, if what the defendant said to the plaintiff about the arsenic was calculated to put him off his guard, rather than excite him to enquiry, then the talk about the arsenic would not avail the defendant.

The jury rendered a verdict in favor of the plaintiff for the value of the horses. A new trial was moved for, because of misdirection on the part of the Court, and because the Court omitted to charge the jury, that the defendant was sued for a fraud, and not upon a contract.

The new trial, moved for, was refused, judgment rendered for the plaintiff, and the defendant appealed, and gave bond.

Strange, for the plaintiff.
Iredell, for the defendant.

NASH, J. The first portion of his Honor's charge is free from exception. To entitle the plaintiff to recover, it was necessary for him to show, that the corn was poisoned with arsenic; that the defendant knew it and concealed it: and that he was injured thereby. And it is correct, as charged, that if the defendant, or his clerk, told the plaintiff, that the corn had been exposed to the influence of arsenic, so as to put him on enquiry, before the contract was completed, the plaintiff could not recover. So far all is correct. We do not concur with his Honor in the subsequent part of the charge. He proceeds "but if such information were given after the property in the corn vested in the plaintiff, it would not avail." We think in this

there was error. The plaintiff claimed damages to the amount of the value of the three horses, which, it was alleged, had been poisoned by eating the corn, and had died. Upon the supposition, that a special action on the case can be maintained for the loss of the horses, the important enquiry, in this case, was as to the amount of damages. If a seller makes a fraudulent representation of an article, yet the purchaser cannot maintain an action for deceit, if at the time of the contract, or before, he knows the fact to be otherwise than as represented. So in this case, if at the time the plaintiff fed his horses with the corn, he knew, or had been informed, it was poisoned with arsenic, although that information came to him after the contract was made, he cannot maintain an action for their loss; because it was his folly to make the experiment, after obtaining the information. The plaintiff, then, was entitled to damages, if the defendant did cheat him, only for the value of the corn, and not for that of the horses, for, either before or after the contract was closed and before the corn was used by him, he was apprised of the fact.

We think there was error also in the closing part of the charge. The jury were instructed, that if what the defendant said to the plaintiff about the arsenic was *calculated* to put him off his guard, rather than excite to enquiry, then the talk about the arsenic would not avail the defendant. The action for deceit rests in the intention, with which a representation is made, or a fact not mentioned. It was not sufficient, that the representation made should be *calculated* to mislead—for that may be done by the most honest communication—but the representation must be made with the intent to deceive. Moral turpitude is necessary to charge a defendant in an action for a deceit. *Hamrick* v. *Hogg*, 1 Dev. 350.

Per Curiam. Judgment reversed and a *venire de novo* ordered.

EVANDER McINTOSH *vs.* SAMUEL C. BRUCE & AL.

The receipt of a deputy sheriff, shewing that he has, as deputy sheriff, received claims for collection, is good evidence in an action by the sheriff against the sureties in a bond, which the deputy has given him for his indemnity.

The case of the *State vs. Fullenwider*, 4 Ired. 364, cited and approved.

Appeal from the Superior Court of Law of Moore County, at Spring Term 1849, his Honor Judge BAILEY presiding.

This is an action of debt on a bond, given by the defendants to indemnify the sheriff, against any damage he might sustain, by reason of his appointment of one of the defendants as his deputy, to-wit: one Hedgpeth.

The bond was duly proved and read in evidence. The breaches assigned were, first: That H. B. Hedgpeth did so demean himself, as to cause the plaintiff, the sheriff of Moore County, to be complained of, and sued in the name of the State of North Carolina, on the relation of Thomas J. Buchanan, on the official bond of the plaintiff, as sheriff &c, and judgment was obtained &c. Secondly; That the said Hedgpeth received judgments and notes, as deputy of the plaintiff, to collect for Thomas J. Buchanan, and did collect the same, and did not pay over, but absconded, and remains in parts unknown. Thirdly; That the said Hedgpeth, as deputy of the plaintiff, did receive notes and judgments to collect for the said Buchanan, or return, and omitted to collect, and did not return said notes and judgments, but absconded, and is still absent in parts unknown. The plaintiff then gave in evidence the record of a judgment, obtained in the Superior Court of Law of Chatham County, in the

name of the State of North Carolina, on the relation of the said Buchanan, against the plaintiff and his sureties, on his official bond as sheriff. The plaintiff then offered in evidence two receipts, in the usual form for the collection of debts as deputy sheriff, which were on file among the papers of said suit in Chatham Superior Court, which original receipts the plaintiff obtained leave of the said Court to withdraw from the office: and also offered to prove, that those were the receipts, on which the said judgment had been obtained; but the testimony was objected to by the defendants, and the Court observed, that the witness should then stand aside—not deciding the question of admissibility at that time; intending to permit the introduction of the said witness again, should the plaintiff show any authority in Hedgpeth from the said Buchanan to collect the said claims. The plaintiff then proved, that the said two receipts were signed by the said Hedgpeth, as deputy sheriff, and offered them in evidence; but they were objected to by the defendants, and excluded by the Court.

The plaintiff then introduced Brently Philips, and one Spivey, who stated, that they had been indebted to Thomas J. Buchanan either by note, or judgment, they could not recollect which; and that the said Hedgpeth brought to them the notes or judgments, he being deputy sheriff, and stated, that the claims belonged to the said Buchanan, and he was collecting them, as deputy sheriff, for the said Buchanan; and that the said witness paid the said debts to the said Hedgpeth, as deputy sheriff, for the said Buchanan, some time in the year 1838. This testimony was objected to by the defendants; when the Court decided, that the plaintiff might prove the payment of the money to Hedgpeth for Buchanan; but excluded the balance of the testimony, saying, the plaintiff must show in some other way, that Hedgpeth was authorised to collect the claims by Buchanan. The plain-

tiff insisted that the *acts* and *declarations* of Hedgpeth, when the claims were in his hands, and when he was receiving their payment from the debtors, were parts of the transaction, and were evidence shewing, or going to shew, that the claims belonged to Buchanan, and that he, Hedgpeth, had authority to collect them.

The plaintiff then introduced Angus M'Caskell, and presented to him the receipt dated January 1st, 1838, being one of the receipts before referred to, and made a part of this case. M'Caskell said, he was well acquainted with the hand writing of H. B. Hedgpeth, and that the signature to the said receipt was in the hand writing of the said Hedgpeth, and was his genuine signature; and that every thing written on the face of that receipt, except "H. B. Hedgpeth, D. S." was in the hand writing of the said M'Caskell. He was then asked, if he had received the judgments therein specified from Buchanan, and gave them for Buchanan, and at his request, to the said Hedgpeth. He said, he had no recollection of either receiving the judgments from Buchanan, or of delivering them to Hedgpeth. He was also asked, if looking at the receipt did not refresh his memory, and enable him to say, that he had received the judgments from Buchanan, and delivered them to Hedgpeth. He replied, "No!" He said, he had no recollection of the matter separate and apart from seeing the receipt, but, well knowing the hand writing of Hedgpeth, and seeing his signature thereto, and seeing also, that the whole receipt was in his own hand writing, he was then confident, that he had received the judgments from Buchanan, and delivered them, at his request, to Hedgpeth to be collected for Buchanan; and he had no doubt of it, and that he was then acting as an officer. To this testimony of M'Caskell the defendants objected, and it was excluded by the Court. His Honor then observed, that he did not see how the plaintiff could get along, being informed that Buchanan had removed

from the State. The plaintiff insisted, that the testimony of M'Caskell was competent, but, under the intimation of the Court, submitted to a non-suit. The plaintiff moved for a rule on the defendants to show cause, why the non-suit should not be set aside, and a new trial granted, and this being refused, the plaintiff prayed an appeal; which was granted.

Kelly, for the plaintiff.

Strange, *Mendenhall* and *D. Reid*, for the defendants.

Pearson, J. The plaintiff made several exceptions upon the rejection of evidence. We put the decision upon one exception, because it is of the most general application.

To charge the defendants as sureties of his deputy upon a bond for the faithful discharge of his duties, the plaintiff offered in evidence a receipt, given by his deputy for the collection of claims, upon which receipt, the plaintiff had been fixed with damages in the action against him.

We think the evidence was admissible. The *letter* of the Act of 1844 does not embrace the case, but it comes within the mischief and the meaning of the Act.

It had been a general practice in the Superior Courts to admit the *receipts* of constables and other officers, as evidence against their sureties, to establish the agency or undertaking to collect claims; and taking a receipt had become the mode, universally adopted, for the purpose of furnishing proof of that fact. This Court decided, that their receipts were not admissible as evidence against sureties. *State* v. *Fullenwider*, 4 Ired. 364. The Legislature, intending to change this rule of evidence, passed the Act of 1844, declaring, that such receipts should be evidence in the cases therein enumerated. The object was not to make exceptions to the rule in certain specific cases, but to change the rule itself; and, of course, the

meaning was to include all cases of a similar kind, and coming within the same mischief. "When there is the same reason, there is the same law."

A deputy sheriff, as a collecting agent, stands on the same footing with a constable. Why should the receipt of a constable be evidence against his sureties, and the receipt of a deputy be evidence against the sureties of a sheriff; and yet the receipt of the deputy not evidence against his *own sureties?* No reason can be given. A construction, which confines an act, changing a rule of evidence, to the cases particularly enumerated, would be too narrow to carry out the meaning of the Legislature.

Per Curiam. Non-suit set aside and a *venire de novo* to be issued.

INDEX.

ACTION.

1. A. hired a negro from B and gave his sealed note for the hire, and added, "the slave is hired on the same terms as other slaves, for the boy Evartson." It being held that this writing only referred to the price of the negro, and was not a memorial of any other terms of the agreement, it was also *held* that, in order to recover damages for a breach of the agreements, not mentioned in the note, an action on the case and not an action of covenant is the proper remedy.—*Twidy* v. *Saunderson*, 5
2. If A. is indebted to B. and puts money in the hands of C. to pay B., B. may sue C. for money had and received to his use.—*Draughan* v. *Bunting*, 10

ADMINISTRATOR AND EXECUTOR.

1. The 17th Section of the 26th Chapter of the Revised Statutes in relation to administrators, was intended for the ease and security of the administrator, and a strict performance is required on his part. *Lee* v. *Patrick*, 135
2. Where in an action against an administrator, a reference is made to a commissioner to take an account of the administration of the assets, and the commissioner makes a report, which is confirmed, this report is conclusive and the administrator is not required to produce an outstanding judgment stated in the report, the amount of which was more than sufficient to cover the balance of the assets in his hands. *Ibid.*

ARBITRATION.

1. The power of an arbitrator is derived, entirely,

from the agreement of the parties, as expressed in the submission, and their award must be made in strict accordance with it, and must neither go beyond nor omit any thing embraced in it. *Cullifer* v. *Gilliam*, 126

2. Where the words of an arbitration are ambigous, such a construction ought to be given to them, as will best co-incide with the apparent intention of the arbitrators. *Ibid.*

3. Where the submission was in the following words, "We hereby bind ourselves to abide the damage awarded C. C. by C. J. and W. W. for the overflowing a certain tract of land, by our mill pond, this 4th of July, 1847 Signed by G. & B.:" and the award was, "We the undersigned have this day viewed the land belonging to C. C., covered by the water of the mill, *late* the property of G. and B., and do assess the damages, which the said C. C. has sustained for the year 1847 at $26 26, for the year 1848 at $23, for the year 1849, at $23, for the year 1850 at $16, and for the year 1851 at $16, and due respectively the January succeeding each year, that is, the damage for 1847 due 1st January, 1848, and so for each year; *Held*, that the arbitrators exceeded their powers and the award was void, because the apparent intention of the submission was only to refer the amount of damages due at the time of the submission. *Ibid.*

4. Where an award has been made by referees, under a rule of Court, and confirmed by the Court, it is binding on all parties, and while it remains unreversed, the judgment cannot be contradicted. *Anders* v. *Anders*, 214

ARSON.

The Act of 1846, ch 70, entitled "an Act to protect houses and enclosures from willful injury," alters the Act of 1836, 1 Rev. Stat. ch. 347, so as to reduce the offence of burning a mill-house, &c., from a felony to a misdemeanor, and substitutes the punishment of fine and imprisonment for that of death. *State* v. *Upchurch*, 454

ATTACHMENT.

1. A legacy in the hands of an executor, due to a married woman, cannot be attached for a debt of the husband. It is not his, until he reduces it into possession. *Arrington* v. *Screws*, 42

2. Process of attachment operates only on such interests of the debtor, as

exist at the time it is served, and not on such as may afterwards arise. *Ibid.*

3. Where A. had, in an attachment against B. been summoned as a garnishee and admitted that he owed B. in a certain negotiable note dated 1st of April, 1836, payable six months after date, and it appeared that before the issuing of the attachment, the note, not then being due, had been *bona fide* transferred to an indorsee, *Held*, that a judgment against A. the garnishee in the attachment, was no bar to the right of the indorsee to recover on the note. *Myers* v. *Beeman*, 116

4. Where an attachment was issued by a justice of the peace for a sum above his jurisdiction to try, and was made returnable before him or some other justice, and where the County Court permitted the plaintiff to amend the process by making it returnable to the County Court, and the Court also permitted the defendant to appeal, upon his giving bond, &c., though he had not replevied. *Held*, that the defendant was entitled to appeal, notwithstanding he had not filed a replevin bond. And *Held*, secondly, that where it appeared that the defendant was not able at the time to procure sufficient securities for an appeal, he was entitled to a *certiorari*, without shewing any merits in fact, the case disclosing, that there were questions of law, which he had a right to have decided by the Superior Court. *Britt* v. *Patterson*, 197

BANKRUPT LAW.

When a debtor has been discharged under the bankrupt law, a surety, who might have come in under the commission, cannot afterwards recover from the debtor. Consequently, where the surety appointed the debtor his executor, the residuary legatees of the surety cannot make the executor accountable for the debt. *Tubbs* v. *Williams*, 1

BASTARDY.

1. One, who appears at Court to answer the charge of being the father of a child about to be born a bastard, may, before an issue is made up, move to quash the proceedings, on the ground that the mother is a woman of color within the fourth degree. *State* v. *Long*, 488

2. If, upon such motion, the proceedings are quashed by the Court, a subsequent warrant, charging the same person with be-

ing the father, issued after the birth of the child, cannot be supported. *Ibid.*
3. The proper relief against the order to quash, if it was deemed erroneous, was by appeal or *certiorari*. *Ibid.*

BONDS.

1. A stranger may accept the delivery of a bond, and it is good, unless the obligee refuse to ratify the delivery; but in the absence of proof to the contrary such ratification is presumed. *Iredell* v. *Barbee*, 250
2. In construing a deed, all useless and unmeaning words are to be rejected, provided enough remains to make the deed sensible. Thus where a bond, purporting to be a guardian bond, was made to "I. Governor, &c. Justices of the Court of Pleas and Quarter Sessions, &c. in the sum of &c. to be paid to the said Justices or the survivors of them," the words "Justices of the Court," &c. "to be paid to the Justices," &c. are to be rejected as unmeaning, and the bond is payable to I. *Ibid.*
3. Where a Court has no power to appoint a guardian but does appoint him, and he gives bond with sureties and takes possession of the estate of the ward, it is not competent for any of the obligors in such bond to object to its validity, on the ground of want of power in the Court to make the appointment. *Ibid.*

BOUNDARY.

1. Where a grant begins on a lake, and thence runs a certain course and distance, then again a certain course and distance, then a third line a certain course & distance, thence "with the windings of the Lake-water to the beginning," *Held*, that although the distance mentioned in the third line should fail before the Lake was reached, yet it must be continued to strike the Lake, and then the boundary be along the Lake. *Literary Fund* v. *Clark*, 58
2. If the course of the third line would not go to the Lake, then from the termination of the distance on that line, a direct course must be taken to the Lake. *Ibid.*
3. A plat, annexed to a grant, cannot control the calls of the grant, where it does not lay down a natural boundary therein called for. *Ibid.*

BURGLARY.

1. There cannot be a constructive breaking, so as to constitute burglary, by enticing the owner out of

his house by fraud and circumvention, and thus inducing him to open his door, unless the entry of the trespasser be immediate or in so short a time, that the owner or his family has not the opportunity of refastening his door. *State* v. *Henry*, 463

2. As where the owner by the stratagem of the trespasser, was decoyed to a distance from his house, leaving his door unfastened, and his family neglected to fasten it after his departure, and the trespasser, at the expiration of about fifteen minutes, entered the house, without breaking any part, but through the unfastened door, with intent to commit felony. *Held*, that this was no burgalry. *Ibid.*

RUFFIN, C. J., dissented.

COMPROMISE.

An offer to compromise is not evidence to charge the party on the original cause of action. But a concluded agreement of compromise must, in its nature, be as obligatory, in all respects, as any other, and either party may use it, whenever its stipulations or statements of facts become material evidence for him. *Sutton* v. *Robeson*, 380

CONSTABLES.

1. When a claim was put into a constable's hands for collection, during the year 1839, and he was guilty of a breach of duty in not collecting it during that year, and he was reappointed for the year 1840, and the claim still remaining in his hands, he was again guilty of a similar breach of duty; *Held*, that the party injured had his election to sue on the bond of either year, or on both bonds.—*State* v. *Wall*, 20

2. *Held*, further, that the circumstance that the party injured had it in his power to recover on the second bond, if he had chosen to do so, did not mitigate the damages he had a right to recover on the first bond. *Ibid.*

3. A constable is the agent of the creditor only during the year he continues to be a constable. For his receipts after that period the creditor is not chargeable. *Ibid.*

4. In an action against a constable for a breach of his official bond, in not collecting a debt, the relator is entitled to recover at least nominal damages, when he shows neglect and unreasonable delay in the collection, although the plaintiff may have received the amount of his debt from the con-

stable after the commencement of the action. *Parish* v. *Mangum*, 210

CONTRACTS.

1. When the contract is for the delivery of a certain quantity of Tobacco, deliverable at a certain place and for a certain price, in order to entitle the purchaser to recover for a breach of the contract, he must allege and prove that he was ready to perform his part of the contract. *Cole* v. *Hester*, 23

2. Where A. contracted to deliver to B. one hundred fish stands of a certain description, and upon tendering them, B. received fifty, but refused to receive the other fifty, because they were not made according to the contract; *Held*, that this receipt of the fifty stands did not make B. responsible for the other fifty, which were not made according to contract. *Freeman* v. *Skinner*, 32

3. A. declared against B. for the breach of an agreement in writing signed by B. in the following words, "R. H. Mosby has promised to procure for my mother a pension from the Government of the U. S. supposed to be due to her as the widow of Lieut. Charles Gerard, and in the event of his doing so, I promise and oblige myself to give the said R. H. Mosby one half of the money due her on account of the said pension. Given under my hand this 3rd day of December, 1838. Charles G Hunter." *Held*, that this agreement referred to a pension to which the widow was then entitled or supposed to be entitled, and not to a pension to which she became entitled under an Act of Congress subsequently passed. *Held* further, that although the sales of pensions are by law prohibited, yet the Court could not infer from this agreement, though a jury might, that the agreement was made by the son, as the agent of his mother. It did not transfer any title to any portion of the pension, and therefore was not, on that account, in itself, invalid. *Mosby* v. *Hunter*, 119

4. *Held*, also, that upon a count for work and labor done, A. could not recover from B., because his services did not enure to the benefiit of B., and therefore the law would not imply a promise.—*Ibid.*

5. Where A. rents out land belonging to B., B. cannot recover against the lessee upon a count on the agreement for rent of the

land, because there was no privity between the latter and B., unless B. can shew that A. acted as his agent. *Hardy* v. *Williams*, 177

6. For the same reason a count upon an implied assumpsit cannot be maintained by B. against the lessee, there being no privity between them, and there being an express contract by the lessee with A. *Ibid.*

7. The Clerk of a District Court of the United States furnished certain transcripts of record to a collector of the customs, who applied for them officially, and, as he stated, by the direction of one of the auditors of the United States' Treasury. *Held*, that the Clerk could not hold the collector personally responsible for his fees, but must look to the United States' Government for what was due to him. *Brown* v. *Hatton*, 319

8. The construction of a written instrument belongs to the Court and not to the jury. *Ibid.*

9. Where two persons, each out of his own stock, delivered goods to a third person to be peddled, and took a bond payable to themselves jointly for the faithful accounting therefor; *Held*, that they could recover upon a bond so taken, notwithstanding each had a separate individual interest. *Haughton* v. *Bayley*, 337

10. Where a lease is made, the rent to be paid in a part of the crop, the contract is executory, and the title to the crop made is in the lessee, until the lessor's part is separated and allotted to him, and, therefore, before that time, the lessor has no right to take possession of any part of the crop, without the consent of the lessee. *Ross* v. *Swearinger*, 481

CORPORATIONS.

1. A municipal corporation, which has authority to grade the streets, is liable to any damages which may accrue to an individual from having the work done in an unskilful & incautious manner. *Meares* v. *Comm'rs of Wilmington*, 73

2. An action in *tort* will lie against a corporation.—*Ibid.*

DECEIT.

1. Where an action was brought to recover the value of certain horses, alleged to have died from eating corn, mixed with arsenic, which the plaintiff bought from the defendant; *Held*, that if the defendant had fraudulently concealed from the plaintiff the fact, that ar-

senic was so mixed with the corn, yet the plaintiff could only recover damages to the value of the corn, provided he was informed, before he gave it to his horses, that arsenic had been mixed with it. *Stafford* v. *Newsom*, 507

2. It is not sufficient, in an action in the nature of deceit, to prove that the representations of the defendant were *calculated* to deceive, but they must be made with *intent* to deceive. *Ibid.*

DEED.

1. The signing, sealing and delivery of a deed by an agent, except where the authority is by an instrument under seal, will only be valid when they are done in the actual presence of the principal.—*Kime* v. *Brooks*, 218

2. A deed is acknowledged by husband and wife; two justices of the peace, thereupon take the private examination of the wife and report to the Court and the Court acts upon the report; *Held*, that the inference is irresistible that the two justices were members of the Court, appointed for that purpose, though no special order of appointment appears. *Etheridge* v. *Ferebee*, 312

3. It is sufficient, if the certificate of the private examination of a *feme covert* states that upon such examination, she declared that she had voluntarily *executed* the deed, without saying that *she doth now voluntary assent thereto*. *Ibid.*

4. If, upon the privy examination, the wife states, that though she was willing to convey when she executed the deed, yet she had changed her mind and was then unwilling; of course the assent of the wife could not be certified. *Ibid.*

5. It is immaterial whether the acknowledgment or the private examination be first recorded. *Ibid.*

6. Where a deed of a married woman had on it only the following entries as to its probate: "State of North Carolina, Currituck County. February Term, 1832. Personally appeared Lydia Cook, wife of John Cook, and in open Court acknowledged that she assigned the within deed of her own free will without any constraint whatever. Let it be registered. (Signed,) W. D. Barnard."

"STATE OF N. CAROLINA, Currituck Sessions, Feb. Term 1832.

"This deed from John Cook and Lydia to *Samuel Ferebee*, was exhibited and proved in open Court, by John L. Scurr, subscribing

witness. At the same time Lydia Cook, the *feme covert*, personally appeared in open Court, and being privately examined by W. D. Barnard, one of the Court appointed for that purpose, who reported, that the said Lydia Cook acknowledged the execution of said deed of her own accord and without any constraint whatever, &c. On motion ordered to be registered.

(Signed.)

S. Hall, c. c. c."

And there was also the following entry on the minute docket of the same term: "A deed from John D. Cook and wife Lydia to Wm. C. Etheridge was proven as to John Cook and wife by the oath of John Scurr, a witness thereto, and her private examination taken in open Court. Ordered regis tered."

7. *Held*, that these entries afforded no evidence that the wife had been privily examined, as required by law. *Etheridge* v. *Ash bee*, 353

DEVISES & BEQUESTS.

1. A testatrix devised as follows: "For the love and affection which I have for J. M., and to en able him to take care of my two old negroes, B. and R., who I wish to re main where I now live and support themselves, I give and bequeath the land whereon I now live," &c. *Held*, that J. M. took a valid legal estate in the land, notwithstanding the objection made, that J. M. was to take and hold the land in trust for the negro slaves. *Meredith* v. *Anders*, 329

2. A. bequeathed a negro woman to his daughter, and afterwards sold her, and kept the amount received from the sale, as alleged by the petition, to be given to the daughter, in lieu of the negro sold; but he made no alteration in his will. *Held*, on demurrer to the petition, that the daughter had no right to the price of the negro. *Snowden* v. *Banks*, 373

3. A testator devised as follows: "I give to my son, Benjamin D. Harper, all my estate after settling my debts, except the $300 above mentioned. If Benjamin does not live till of age, then I dispose of my estate as follows: I give to my sisters," &c. Benjamin died under age. *Held*, that he was entitled to the profits of the estate, (except the $300) during his life. *Albritton* v. *Sutton*, 389

DISTRIBUTEES.

1. Per Nash and Pearson, J. The word "distributees" may be properly used in

a petition, calling an administrator to an account, to denote those, who are entitled to succeed to an intestate's estate, under our Statute of distributions. *Henry* v. *Henry*, 278

2. Per RUFFIN, C. J. The word "distributees" is not to be found in any English Dictionary or in any law book and conveys no definite idea. It therefore cannot be intended by the Court to mean those, who are entitled to distribution of an intestate's estate. *Ibid.*

DOMICIL.

1. The domicil of origin of a person continues until he acquires another, by actual removing to another country with the intention of remaining in the latter altogether or for an indefinite period. *Horne* v. *Horne*, 99

2. Two things must concur to constitute a domicil; first, residence, and, secondly, the intention to make it a home. *Ibid.*

3. And if these two concur, it makes no difference how short his residence may be in the new domicil. *Ibid.*

EJECTMENT.

1. One of several lessors in an action of ejectment has a right to have his name erased from the declaration. *Scott* v. *Sears*, 87

2. He is liable to his colessors for his proportion of the costs, but, if judgment be ultimately rendered in favor of the plaintiff, he is entitled to be reimbursed for such proportion out of the costs recovered from the defendant. *Ibid.*

3. Where a recovery in ejectment is effected on the demises of two only out of several tenants, and afterwards an action is brought for mesne profits, none but the shares of such mesne profits, to which those two tenants are entitled, can be recovered. *Holdfast* v. *Shepard*, 222

4. And it makes no difference whether the action for the mesne profits be brought in the name of the fictitious lessee or of his lessors. *Ibid.*

5. A., by virtue of an order of the County Court, founded on a judgment before a justice and an execution thereon, levied on the 8th of March 1842, issued a *venditioni exponas*, bearing teste of May Term, 1842, under which the land of B. was sold and A. became the purchaser: C. issued a *venditioni exponas* tested of May Term 1842, pursuing a *fi. fa.* tested of February Term 1842, under which the same land of B. was sold, and D. be-

came the purchaser, and having effected a recovery in ejectment, was about to turn B. out of possession, when B. accepted a lease from D. and continued in possession — *Held*, that, in an action of ejectment by A. against B, although D. who had been admitted to defend as landlord could make no defence which B. could not have made, yet B. himself might have given in evidence these circumstances to rebut A.'s claim to recover, by shewing D.'s title to be paramount to A.'s and that he (B) was D.'s tenant. *Jordan* v. *Marsh*, 234

6. In an action of ejectment, where the declaration contained several counts, some of which were on the demises of persons, who had died before the action was brought; *Held* that the Court below did right in ordering these counts to be stricken from the declaration. *Adderton* v *Melchor*, 349

EVIDENCE.

1. A. hired a negro from B. and gave his sealed note as follows, "On the 1st day of January, 1848, I promise to pay to B. one hundred and thirty dollars, the slave is hired on the same terms as other slaves, for the hire of the boy Evartson." *Held*, that this writing only referred to the price of the negro, and was not a memorial of any other terms of the agreement, and that, as to these latter, parol evidence was admissible.— *Twidy* v. *Saunderson*, 5

2. Where the declarations of one, alleged to be an agent, are offered to be given in evidence, it is incumbent on the Judge to determine, at least so far as to say, whether there is such *prima facie* evidence of agency, as to render the acts and declarations of the proposed witness those of the plaintiff. *Munroe* v. *Stubbs*, 49

3. It is the province of the Court to pass on every question of the admissibility of evidence. *Ibid.*

4. Merely serving a warrant for debt, issued by a justice, is no evidence that the officer was the agent of the plaintiff in the warrant. *Ibid.*

5. The declarations of a slave, at any particular time, as to the state of his health, are, from necessity, admissible in evidence. *Roulhac* v. *White*, 63

6. Whenever the bodily or mental feelings of an individual, at a particular time, are material to be proved, the expression of such feelings, made at or soon before that time, is

evidence, of course subject to be weighed by the jury. *Ibid.*

7. The possession of a stolen thing is evidence to some extent, against the possessor, of a taking by him. Ordinarily, it is stronger or weaker, in proportion to the period intervening between the stealing and the finding in possession of the accused; and, after the lapse of a considerable time, before a possession in shewn to the accused, the law does not infer his guilt, but leaves that question to the jury under a consideration of all the circumstances.—*State* v *Williams*, 140

8. The question of identity, where different names are alleged to relate to the same person, is one exclusively for the jury. *Toole* v *Peterson*, 180

9. Per NASH, J. A witness who has known a town for a great number of years, may give evidence of a general and uniform reputation and understanding, that the town was covered by a particular grant. *Ibid.*

10. Per PEARSON, J. and RUFFIN, C. J. The evidence cannot be received for that purpose, but is competent to shew that what was once called the town of N. was now called the town of W. *Ibid.*

11. It is a general rule, that the declarations of a party accused of a crime, made in his own favor, after the time of the alleged commission of the crime, are not evidence for him. *State* v *Hildreth*, 440

12. Proof of the hand writing of a deceased subscribing witness to a bond is not, strictly, *prima facie* evidence of the execution of the bond, though it will authorize the reading of the instrument to the jury. But the jury must weigh this, together with the other circumstances given in evidence, and, from the whole, determine whether the alleged instrument was executed or not. *Black* v. *Wright*, 447

13. It is among the strongest circumstantial proofs against a person, that he omits to give evidence to repel circumstances of suspicion against him, which he would have it in his power to give, if those circumstances of suspicion were unfounded. *Ibid.*

14. A declaration in a deed, that the land, conveyed by it, had been before granted to a certain person, is not evidence for the parties to the deed, that in fact it was thus granted. *Crump* v *Thompson*, 491

15. It has been the universal practice in this State to

permit an Attorney in a cause to give evidence, at the instance of his client. *State* v. *Woodside*, 496

16. The receipt of a deputy sheriff, shewing that he has, as deputy sheriff, received claims for collection, is good evidence in an action by the sheriff against the sureties in a bond, which the deputy has given him for his indemnity. *McIntosh* v. *Bruce*, 511

EXECUTION.

1. The lien of a *fieri facias* upon the equitable interest of a debter commences only from the time of its issuing, and not from its *teste*. *Morisy* v *Hill*, 66

2. A. by a verbal contract, agrees to convey a tract of land to B. upon condition that B would erect a house upon it. Before this was done C. levies an execution he had against B. upon his interest in the land. A. then conveys the land to D., and, with a view of overreaching C.'s execution, antedates the deed. *Held*, that the mere antedating the deed did not make it fraudulent and void. *Held*, secondly, that B., having only a parol contract for the sale of the land, had no equitable claim against A. which was liable to execution under our Act of Assembly, subjecting equitable interests in land to sale by execution.—*Patterson* v *Bodenhamer*, 96

FELONY.

One, who is present and sees that a felony is about to be committed and does in no manner interfere, does not thereby participate in the felony committed.—Every one may, upon such an occasion, interfere, to prevent, if he can, the perpetration of the felony, but he is not bound to do so, at the peril, otherwise, of partaking of the guilt. It is necessary, in order to make him an aider or abetter, that he should do or say something, shewing his consent to the felonious purpose and contributing to its execution. *State* v *D. Hildreth*, 440

FORCIBLE TRESPASS.

The gist of the offence of forcible trespass is a high handed invasion of the possession of another, *he being present*—title is not drawn in question. *State* v *McCanless*, 375

If two are in the same house, the law adjudges the possession in him, who had title; but not so, as, by relation back, to make the other guilty of a forcible trespass, when the entry was without force. *Ibid.*

FRAUDS, STATUTE OF

1. Where A. has a cause of action against another, and B makes a parol promise to indemnify A., which promise is *superadded* to the claim, which A. has on his original cause of action, the statute, making void parol promises to indemnify against the default, &c. of another, will apply.—*Draughan* v *Bunting*, 10

2. But, if there is no debt for which another is, or is about to be, answerable, or if the debt of the other is discharged and the promise is *substituted*, the statute does not apply.—*Ibid.*

FRAUDS AND FRAUDULENT CONVEYANCES.

Where A. made a deed of trust to secure creditors, and it was stipulated in the deed that a sale should not take place for three years, and, in the meantime, the trustor should remain in possession of the property, consisting of lands, negroes, &c., & on the trial of a suit, the creditor, impeaching the trust, admitted that there was no actual fraud, but contended that the deed on its face was fraudulent in law; *Held* by the Court, that, whether the deed was frudulent or not was a matter for a jury, under all the circumstances, but that the Court could not, from what appeared on the face of the deed, say it was fradulent in point of law, because there might be many circumstances, in which such a deed would be good, and the creditor admitted that it was not fraudulent in fact. *Hardy* v *Skinner*, 191

1. Where a deed is absolute on its face, but it is alleged, that it was on a secret trust for the donor, with intent to defeat his creditors, it must be left to the jury to ascertain the existence of such trust.—But where a deed, made without consideration by a debtor, expresses on its face that it is made for the benefit of the debtor and his family, the Court can itself pronounce it fraudulent and void, as against a creditor then existing. *Sturdivant* v. *Davis*, 365

2. A fraudulent donee of personal property, which he has in possession after the donor's death, is answerable as executor *de son tort*. *Ibid.*

FREE PERSONS OF COLOR.

1. The term "free person of color," in our penal statutes, is to be understood in our law to mean a person descended from a negro, within the fourth

degree inclusive, though an ancestor in each intervening generation was white. *State* v. *Dempsey*, 384

GAMING.

Under the statute against gaming, Rev. Stat. ch. 34, sec. 69, the place of gaming and the place of retailing must be the same house, or. at the least. parts of the same establishment. "The premises" mean those places only, which are occupied by the retailer with the house in which he retails, as one whole. *State* v. *Black*, 378

GRANTS.

The passage the several Acts of Assembly, enlarging the time, within which grants shall be registered, makes them good and available by relation back, from the time when they are dated, as much so as if they had been registered within two years. *Hill* v. *Jackson*, 333

HOMICIDE.

1. If a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, *at the instant*, strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of man-slaughter, giving due weight to motives of policy and the necessity for subordination. *State* v. *Cæsar*, 391

2. The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present and instantly kills the assailant, without, in like manner, evincing, by the means used, great wickedness or cruelty.—*Ibid.*

RUFFIN, C. J., dissented.—*Ibid.*

3. In an indictment for homicide, it is the province and duty of the Court to inform the jury, upon the supposition of the truth of the facts, as being agreed on or found by the jury, what the degree of the homicide is. *State* v. *R. Hildreth*, 429

4. Where the State, in a prosecution for a homicide, relies upon the ground of express malice, the witnesses can only prove the existence of previous malice or threats, but they cannot prove the existence of the malice up to the time of the homicide and that the prisoner acted on it in slaying. It is the province of the jury to make those inferences, or not, upon the facts proved. *Ibid.*

5. When persons fight on

fair terms, and, after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument and inflicts a deadly injury, it is manslaughter only; but, if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder.—*Ibid.*

6. Upon a quarrel, one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued with his arm uplifted, and when he reached his opponent, stabbed & killed him, the latter having stopped and first struck with his fist; *Held*, that this was a clear case of murder. *State* v. *Howell*, 485

HUSBAND AND WIFE.

1. Wherever a suit will survive to a wife, she may be joined with her husband in the action. *West* v. *Tilghman*, 163

2. A distributive share, accruing to the wife during the coverture, does not vest in the husband, but will survive to the wife, unless reduced into possession by the husband. *Mardree* v. *Mardree*. 295

3. Where the wife is the sole next of kin and the husband the administrator, and the debts of the intestate are paid or assumed by him, and there are no reasons why he should hold any longer as administrator, the presumption is very strong that he held as husband, and consequently for himself. *Ibid.*

4. Where there are other next of kin besides the wife, the husband, being administrator, in order to entitle him to the property in his own right, must appear by some act to be exercising a dominion over it, not according to his duty as administrator or in the discharge of functions of a representative character, but for his own benefit and as personally the owner. Thus when the husband and the other next of kin, there being other funds for the payment of the debts, had agreed to employ the negroes, &c., on the lands of the intestate and at the end of the year to divide the proceeds of the crop among them "according to their rights as distributees;" *Held*, that this was a sufficient reduction into possession by the husband, to prevent any right of survivorship in the wife. *Ibid.*

5. Where on a divorce a *mensa et thoro*, the wife is

allowed, in part of alimony, the rent of certain lands, out of which she makes an annual saving, the husband has no right to the amount accumulated out of such saving.—*Darden* v. *Joyner*, 339

INDICTMENT.

1. An indictment, which charges that "A. B. late, &c., at, &c., with force and arms, on, &c., did publicly curse and swear and take the name of Almighty God in vain, for a long time, to wit: for the space of two hours, to the common nuisance of all the citizens of the State, and against the peace and dignity of the State," cannot be supported.—*State* v. *Jones*, 38

2. To render the offence of profane swearing indictable, the acts must be so repeated and so public, as to become an annoyance and inconvenience to the public, for then they constitute a public nuisance. *Ibid.*

3. It is not sufficient to the conviction of a defendant in such an indictment, that the State should shew by its evidence, that the defendant has been guilty of a nuisance; the indictment must charge it; it must set forth specially the whole fact with such certainty, that the Court may be able to see, judicially, that it rests on sufficient grounds. Nor will it be sufficient, if the indictment charges, that the acts were done "to the common nuisance of all the good citizens of the State," unless the facts so charged amount in law to a nuisance.—*Ibid.*

4. An indictment will lie under our Statute for feloniously taking and carrying away a runaway slave, "with intent to dispose of him to another," &c., even though the taker did not know who was the owner of the slave. *State* v. *Williams*, 140

5. Where there were different counts in a bill of indictment, one charging a taking by the prisoner with violence, and another by seduction, and each of them also charging a conveying away, with the intents required by the Statute, the jury are not bound to find in which way the taking was had, but the verdict may be general, though there are other defective counts. *Ibid.*

6. An indictment, in a case under our Statute, for the abduction of negroes, which charges that the defendant, "by violence, feloniously took," is as good as if it had averred that the defendant "felon-

iously by violence took," &c. *Ibid.*

7. In an indictment relating to the larceny or abduction of a slave, in describing him as the property of A. B., you may use indifferently the phrases, "then and there being the property, or of the proper goods and chattels, of A. B." &c., or and "the property of A. B.," after laying the value, &c., of the slave. *Ibid.*

8. In an indictment for stealing, &c., a slave, under our Statute, the words "with an intent to sell and dispose of the said slave," are sufficient. *Ibid.*

9. It is in the discretion of the Attorney General, on the trial of a capital case, to introduce on behalf of the State, only such witnesses as he may think proper. *State* v. *Stewart*, 342

10. If, on the trial of a capital offence, the counsel for the prisoner does not ask the Court to give to a mulatto witness, introduced on the part of the State, the charge required by the Act of Assembly, Rev. St. Ch. 111, Sec. 51, advantage cannot afterwards be taken of the omission of the Judge to make such charge. *Ibid.*

11. Whether such a charge was or was not given, cannot appear upon the record, unless placed there by the exceptions of one or the other party.—*Ibid.*

12. In an indictment for selling to a slave in the night time, it is not necessary to negative an order of the owner or manager, the offence having been committed in the night time. *State* v. *Robbins*, 356

13. In such an indictment, the slave is sufficiently identified by his name; a further description by giving the name of the owner, is not necessary. *Ibid.*

14. Where there are two counts in an indictment, one good and the other defective, and there is a general verdict against the defendants, the judgment will be presumed to have been given upon the good count alone. But when both counts are good and the Court gives erroneous instructions to the jury as to one of the counts, it is presumed that the judgment was given upon both counts, and a *venire de novo* will be awarded. *State* v. *McCanless*, 375

15. In this State, where one is tried, as for a felony, yet the facts averred in the indictment do not support the charge of felony, but amount to a misdemeanor, the Court

may give judgment for such misdemeanor. *State* v. *Upchurch*, 454

16. Where a defendant was convicted on an indictment for a felony and appealed from the judgment thereon to the Supreme Court, and the error assigned in this Court was, that the facts stated in the indictment did not amount to a felony, the Supreme Court, though it reverses the judgment for this error, yet will, (under the provisions of the Act establishing the Court) give directions to the Court below to give judgment for a misdemeanor, where it appears that is the judgment, which should have been there rendered. *Ibid.*

INFANT.

An infant, being entitled to a sum of money arising from the sale of a tract of land, sold under a decree of a Court of Equity, and the same having been received by her guardian, conveyed it by a deed of trust to her separate use, and if she died without leaving a child, to her intended husband. She married and died under age and without a child. *Held*, that in a Court of Law, at least, her personal representative was entitled to recover the money so received by the guardian. *Reddick* v. *Satterfield*, 358

INSOLVENT DEBTORS.

1. In a proceeding under the insolvent laws, when the debtor has been arrested on a *ca. sa.*, it is too late for him, after giving bond and joining in an issue of fraud, to take exception to the writ of *ca. ca.* *Nixon* v. *Nunnery*, 28

2. Although the *ca. sa.* may be void, yet the Court has jurisdiction of the subject matter, and objections to any part of the proceedings must be made in apt time. *Ibid.*

3. When the creditor alleges fraud, if his specification be not sufficiently certain, and a defendant, before issue joined, objects to it, and the Court should refuse to make it certain, it would be error. But an objection to the specification is too late after issue joined. The verdict cures the defect. *Ibid.*

4. The rule is that the verdict cures all omissions or defects, which must necessarily have been passed upon by the jury. *Ibid.*

5. A verdict is not too vague when it responds to the issue. *Ibid.*

6. It is not necessary that the land, alleged to have been fraudulently con-

veyed by the debtor, should be over the value of ten dollars. The law does not permit the debtor to convey, with intent to defraud, land, or any other *visible* property, no matter how small the value. *Ibid.*

7. Where a defendant has been arrested upon *mesne* process and gives bail, and, after judgment, the bail surrenders him to the sheriff, out of term time, no execution having been issued on the judgment nor any *committur* prayed by the plaintiff, if the sheriff releases him upon a bond to appear at Court and take the benefit of the insolvent law, the sheriff is liable for an *escape*. *State* v. *Ellison*, 261

8. The Act, Rev. St. Ch. 58, in this respect, only applies to cases where the debtor, upon surrender of his bail, is ordered into custody by the Court.—*Ibid.*

9. After such surrender, if the creditor, upon reasonable notice, will not charge the party in execution, either a *habeas corpus* or a *supersedeas* would be issued by the Court. *Ibid.*

10. Although the bond of a person, arrested upon a *ca. sa.* within twenty days of the term of a Court, should be conditioned for his appearance at the next succeeding term, yet the debtor may waive this privilege, and give a bond for his appearance at the first term, and this bond shall be valid. *Hardison* v. *Benjamin*, 331

JURISDICTION.

The only jurisdiction conferred on this Court in cases at common law is appellate, after a judgment in the Superior Court. Where there has been no such judgment, the cause will not be entertained in this Court.—*McKenzie* v. *Little*, 45

LIMITATIONS, STATUTE OF

1. In an action for harboring a slave, to which the statute of limitations was pleaded, the plaintiff could not prove any act of harboring within three years before the commencement of the action, but proved that the defendant had harbored the slave for several years before that period; *Held*, that the Court should have instructed the jury that there was no evidence to rebut the plea of the statute of limitations, or from which the jury could infer any act of harboring within the three years. *Barnes* v. *Farmer*, 202

2. In cases of adverse pos-

session of land, the statute of limitations begins to run from the ouster. If the one having the right be a *feme covert*, and the seven years have expired in the lifetime of her husband, she has three years, and only three, after the death of her husband, within which to commence her suit: when the seven years have not expired in the lifetime of her husband, the two periods of seven years from the ouster, & three years from the death of the husband are concurrent, until one of them shall have run out; and then the *feme* is entitled to the other and longer period, to enter or sue. *Crump* v. *Thompson*, 491

MERGER.

A promise, made *after* a covenant, is merged, upon the same ground that a promise, made *before*, is merged, when the promise and the covenant are precisely the same, because the covenant, being a deed, is the surest and highest evidence.—*Burnes* v. *Allen*, 370

NUISANCE.

1. A stable in a town is not, like a slaughter pen or a hog style, necessarily or *prima facie* a nuisance. But if it be so built, so kept, or so used, as to destroy the comfort of persons owning and occupying adjoining premises and impairing their value as places of habitation, it does thereby become a nuisance. *Dargan* v. *Waddill*, 244
2. If the adjacent proprietors be annoyed by it in any manner, which could be avoided, it becomes an actionable nuisance, tho' a stable in itself be a convenient and lawful erection. *Ibid.*

OFFICIAL BONDS.

When a term of office (as that of sheriff) is for more than one year, the bonds given for the faithful discharge of the duties of his office at the time of the appointment, and the new bonds given from time to time afterwards, are cumulative; that is, the first bonds continue to be a security for the discharge of the duties during the whole term, and the new bonds become an additional security for the discharge of such of the duties as have not been performed at the time they are given.—*Poole* v. *Cox*, 69

PRACTICE AND PLEADING.

1. Where more damages are recovered than are demanded, the plaintiff will be permitted to remit the

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excess, and have judgment for the proper sum, on paying the costs of this Court. *Harpor* v. *Davis*, 44

2. Where there are more pleas than one, and the jury find on them all, and error is alleged in the charge of the Court only as to one, this Court must affirm the judgment below. *Munroe* v. *Stutts*, 49

3. Where a party moved to be permitted to shew a paper to a witness for the purpose of refreshing his memory, which motion was refused and an appeal taken, it must appear in the case sent up, what were the contents of the paper, that the Court may see whether they were such as were calculated to have the effect proposed. *Lee* v. *Patrick*, 135

4. Where an execution from a justice of the peace has been levied on land and returned to the County Court, where judgment is rendered for the plaintiff, he may either have an order of sale, under which he can only sell the land levied on, or he may take an execution as in other cases of judgments.—*Powell* v. *Baughan*, 153

5. A special *fieri facias* may be added to a *venditioni exponas*, whenever a *fi. fa.* itself may be sued out. *Ibid.*

6. A count for a forcible entry may be joined with a count for an assault and battery. *Flinn* v. *Anders*, 328

7. Where several persons are indicted for a trespass, it is not a matter of right for any of the defendants to insist, on the trial, that the jury should be required to pass upon the guilt or innocence of any of the others, before they pass upon the whole. This is a matter of discretion in the presiding Judge—a discretion rarely, if ever, used, except in cases, where there is no evidence against a part of the defendants, or where the Court is satisfied, that persons are made defendants, to prevent their being examined in the case, *State* v. *Bogue*, 360

8. It is the province of the Court, in which the trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial.—*State* v. *R. Hildreth*, 429

PROCESS.

1. The law requires that a writ (as in this case an execution) shall be returned to the Court and not to the Clerk. *Hamlin* v. *March*, 35

2. It is true the Clerk is the officer of the Court to receive the writ, and what-

ever may be raised upon it, as his office is the place, where the records of the Court are kept and preserved. *Ibid.*

3. If the Clerk will not receive the return, when tendered to him, the officer, to discharge his duty, must return the precept and the money, if he has made it, to the Court.—They will, upon a proper representation, make such order, as the case may require, and, in a proper case, direct their officer to receive the process.—*Ibid.*

4. The death of the Clerk during term time, is no excuse for not making the return. *Ibid.*

REPLEVIN.

1. Our Act of Assembly in relation to Replevin, Rev. Stat. ch. 101, does not repeal nor supersede the common law remedy of replevin. *Duffy* v. *Murrell*, 46

2. At the common law, an action of replevin could only be maintained in cases of actual taking.—Under our statute, taking is not necessary to entitle the party injured to his remedy. *Ibid.*

3. Where an execution issues against A. and is levied *bona fide* on property in the possession of B., on the allegation that the property is really in A., the action of replevin will not lie against the sheriff. *Carroll* v. *Hussey*, 89

ROADS AND WAYS.

1. The Courts have no authority to have the lands of the citizens taken for a cart way, without the consent of the owner, except in the instance provided for by the Statute, "If any person shall be settled upon or cultivating any land, to which there is no public road leading or no way to get to or from the same, other than by crossing other persons' land." *Lea* v. *Johnston*, 15

2. Therefore where there was a public road to which access might be had, though not so convenient for the petitioner, as the cart way he prays for, the Court cannot grant the petition. *Ibid.*

SALES.

1. Where an owner of a slave stands by and sees the slave sold by another, having no title, and makes no objection, yet he is not thereby estopped from asserting his legal title.—*West* v. *Tilghman*, 163

2. The title to a slave can only be conveyed, according to the laws of this State, by a sale in writing, except when delivery accompanies the sale,

or by a gift evidenced by a written instrument, the written instrument in each case to be attested by a subscribing witness and proved and recorded. *Ibid.*

SHERIFFS.

1. Notwithstanding the language of the private Act passed in 1835, relative to the County Trustee and Sheriff of Moore County, an action in the name of the State to the use of the County, will lie against the Sheriff for not collecting and accounting for the County taxes — *State* v. *McIntosh*, 307
2. Although a sheriff is a defaulter when he is re appointed, yet his re-appointment is not thereby void. *Ibid.*
3. It is the duty of a sheriff to apply to the Clerk of the County Court in proper time for a certified copy of the tax list, and if he does not, neither he nor his sureties can avail themselves of the neglect of the Clerk to furnish such list. *Ibid.*
4. A demand is not necessary, before action brought, for money collected by a sheriff for public purposes. *Ibid.*

SLANDER.

1. In an action of slander, when the charge is made directly, the plea of justification should aver the truth of the charge, as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to shew the meaning of the words, the plea should aver the truth of *the charge*, which the declaration alleges was meant to be made. *Snow* v. *Witcher*, 346
2. In an action of slander, by a single woman, under the Act of 1808, Rev. St. Ch. 110, where the words charged were "that she had lost a little one," "Z. S. is a credit to her," the said Z. S. being notoriously an incontinent person, and, "she better be listening to the report about herself losing a little one;" *Held*, that it was sufficient for the defendant to plead and prove that the plaintiff was an incontinent woman. *Ibid.*

SLAVES.

Where on petition of an executor, in pursuance of the directions of his testatrix, an order was passed in 1805 by the County Court, "that the said executor have leave to emancipate his said slave, he first giving bond and security as required by law," and the bond was not given till 1816, and

ever since that order, until the year 1845, the said slave and her children had been permitted to enjoy all the rights of free persons of color; *Held*, that neither the executor, whose duty it was to give the bond, nor any person claiming under or through him can take advantage of that omission, much less a mere wrong-doer, after the lapse of so many years. *Cully* v. *Jones*, 168

STATUTES, *construction of*

Every affirmative statute is a repeal, by implication, of a prior affirmative statute, so far as it is contrary to it. But the law does not favor these implied revocations, nor are they to be allowed, unless the repugnancy be plain; and where, in the latter act, there is no clause of *non obstante*, it shall, if possible, have such construction, that it shall not operate a repeal. *State* v. *Woodside*, 496

SURETY AND PRINCIPAL.

1. A surety, who seeks to recover from a co surety a rateable part of money paid, must take care to do no act, which will prevent the co-surety from having recourse against the principal. If, therefore, he release the principal, it is a discharge of the co-surety. *Draughn* v. *Bunting*, 10

2. A. brought a suit on a note, in which B. was the principal, and C. surety. B. was dead and the suit was against his administrator and C. At the return term A. entered a *nolle prosequi* against the administrator of B and took judgment against C. alone. C. having paid the debt, brought suit against the administrator of B., who in the meantime had disbursed all the assets in the payment of other debts of equal dignity with that of A. *Held*, that the administrator of B. had committed no *devastavit* as regarded C., that C. as a surety, had no further rights than A. had possessed, and A having relinquished his lien upon the assets of B by discontinuing his suit against the administrator, the right of the surety, as the substitute of his principal, to obtain priority, could only accrue from the commencement of his action against the administrator of B. *Coltraine* v. *Spurgin*, 52

TAXES.

1. Spinning machinery, used in a factory, constitutes a part of the improvements of real estate required to be assessed for taxation

under our revenue laws. *Makepeace, ex parte*, 91
2. Under the private Acts of 1831 and 1835, relating to the County of Brunswick, any three or more justices, sitting in Court, may lay the taxes. As regards this, the Act of 1835 does not repeal the Act of 1831. *State* v *Woodside*, 496
3. Although the tax list, made out by the Clerk and delivered to the Sheriff, may be defective, yet the Sheriff who receives it and acts under it, cannot make the objection. *Ibid.*
4. Where a public officer collects money due to a County, no demand is necessary, before suit brought. *Ibid.*
5. The County Trustee, where there is one, is the proper relator in an action to recover moneys due to the County, except when he is a defaulter or when he refuses to proceed against defaulters. In these cases suits may be brought by the Committees of Finance in the name of the State. *Ibid.*

TENANTS IN COMMON.

1. Where it appeared that A raised Tobacco on his mother's land, and was to have one sixth for his labor, &c; *Held*, that A. was not a tenant in common with his mother, as to one sixth, and had no property in it or lien on it. *Cole* v. *Hester*, 23
2. Where a tenant in common holds over after partition, his possession shall not be considered adverse, until a demand is made by the other tenants, unless he does some act amounting to an actual exclusive possession, which could give notice that he intended to keep out all others, or some act amounting to a disclaimer of the rights of the other tenants. *Anders* v. *Anders*, 214
3. The law permits to each tenant in common a peaceable entry upon every portion of the land held in common, but it does not justify any actual force applied to the person of his co tenant.—*Flinn* v. *Anders*, 328

TENANT AND LANDLORD.

1. Where a person, already in possession of land, takes a lease from another, and holds over after his term has expired, whether this is a case coming within the provisions of the Act, Rev. St. Ch. 31, Sec. 51, requiring bonds from tenants refusing to surrender possession, &c. *Quere?* *Phelps* v. *Long*, 226
2. But in all cases where the landlord wishes to avail himself of the provisions of that Act, he not

only must state the lease and that the term has expired, but he must also set forth in his affidavit explicitly or in such a manner that the Court may necessarily or fairly draw the inference, that the tenant, after the term expired, had *refused* to surrender the possession. *Ibid.*

3. What notice to quit from a landlord to a tenant is required in this State.—*Quere? Ibid.*

4. Where a person was sued as casual ejector and the Court improperly refused the tenant permission to plead, upon the ground that he was a tenant holding over & therefore bound to give a bond as required by the Act, Rev. St. Ch. 31, Sec. 51, when it did not appear that he had refused to deliver possession, and thereupon entered judgment by default against him. *Held*, that he was entitled to an appeal. *Ibid.*

WARRANTY.

A., being tenant by the curtesy, sells land belonging to his wife, by deed of bargain and sale, in fee, with general warranty. *Held*, that the right of the heir of the wife to the land was not rebutted by the warranty. *Johnson* v. *Bradley*, 362

WILL.

1. If a testator knows what he is doing and to whom he is giving his property, his mental capacity is sufficient to enable him to make a will. *Horne* v. *Horne*, 99

2. A probate of a will in common form cannot be set aside on a petition for a reprobate, without shewing some reason, why the former probate was wrong and should not have been allowed. *Armstrong* v *Baker*, 109

3. The mere fact, that all the parties interested in the estate of the deceased were not cited in the original probate is not, of itself, a sufficient ground for a re-probate. *Ibid*

4. Especially the Court will not set aside the probate in common form, upon the petition of the widow, who admits that the will was properly proved, but desires a re-probate to enable her to enter her dissent within six months thereafter. *Ibid.*

5. In a probate of nuncupative wills, every requisition of the Statute ought to be faithfully observed; and especially the probate will not be good if the next of kin are not cited. *Rankin* v. *Rankin*, 156

6. The propounder of a will of a married woman should properly file alle-

gations in writing and on oath, setting forth the instrument or facts relied on, so as to put on the record such a case as would shew that the paper propounded might be the will of the party deceased, notwithstanding her coverture. *Whitfield* v. *Hurst*, 170

7 In like manner the party contesting should put in his allegations in writing, pleading a former sentence as a bar to any further litigation, and, of course, to ordering another issue, or denying the existence of any alleged agreement or of any right in the wife to bequeath. *Ibid.*

8. And these are preliminary matters proper for the Court to decide, and not matters for the jury.—*Ibid.*

9. A Court of Probate cannot construe a marriage settlement, so as to determine whether it vested a separate estate in the wife or not. *Ibid.*

10. But where a marriage agreement gives a color to the act of the wife in making a will, that is sufficient to induce the Court of Probate to admit the paper, leaving it to the Court of Equity ultimately to construe and enforce the articles and compel the execution of the will, if made, in the view of that Court, under a sufficient authority, or by virtue of a sufficient estate in the wife. *Ibid.*

11. After an issue of *devisavit vel non* is submitted to a jury, there cannot be a definite sentence upon a paper offered as a will, but upon the verdict of the jury, unless the issue is itself set aside. *Ibid.*

12. After such an issue made up, either party has a right to insist on a verdict *Ibid.*

13. In an issue of *devisavit vel non*, where the subscribing witnesses to the supposed will disagree as to the capacity of the supposed testator, other proof may be given as to that fact, and the jury must decide upon the whole evidence. *Bell* v. *Clark*. 239

14. A petition to set aside the probate of a will, on the ground of the want of citation of the next of kin, will not be granted for that cause alone, but merits must be shewn, and it must appear that the former proceedings resulted wrongfully, and the interests of the petitioners, if under disability themselves, were not duly defended by those who undertook to defend them. *McNorton* v. *Robeson*, 256

15. A petition to set aside the probate of a will, on the ground of the newly

discovered testimony, on points to which evidence was given at the probate of the will, will not be granted, unless such testimony not only repels the adversary's charge, but also destroys his proofs, by shewing that the former verdict was obtained by surprise and perjury. *Ibid.*

16. A. made his will in 1837, in his own hand writing, but unattested, and it was placed among his valuable papers. Afterwards, in 1847, being about to leave this country, he deposited this will, together with other papers, with a friend for safe keeping. *Held*, that this did not of itself amount to a re-publication of the will, and that therefore land acquired after 1837, did not pass under it. *Battle* v. *Speight*, 288

17. The Act of 1844, ch 83, making devises to operate upon such real or personal estate as the testator may own at the time of his death, does not apply to wills executed before the passage of that Act. *Ibid.*